Nos. 38 and 39.

In the Supreme Court of the United States

October Term, 1946.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION and INTERNATIONAL LADIES' GARMENT WORKERS' UNION.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, *Petitioner*,

vs.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION and NATIONAL LABOR RELATIONS BOARD.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER.

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SPECIFICATION OF ERRORS AND POINTS RELIED UPON.

I.

There is competent, relevant and substantial evidence to support the findings and order of the Board. This being so it is error for a court to set aside the order because the court believed the Board did not give that weight to given evidence which the court believes it should have. (Point I of the Argument, p. 71.)

II.

It is error for a court to set aside the order of the Board on the ground of denial of due process because of procedural error in the receipt or rejection of evidence. Procedural error is not a denial of due process. (Point II of the Argument, p. 75.)

III.

It is error for a court to set aside the order of the Board on account of the rejection of evidence, when such rejection would not have been reversible error in an ordinary jury trial. (Point III of the Argument, p. 84.)

IV.

It is error for a court to set aside the order of the Board on the ground that the Board did not consider and weigh given evidence, in the face of declarations in the findings by the Board that such evidence was received, considered and weighed, and where the record clearly supports the truth of such Board declaration. (Point IV of the Argument, p. 90.)

V.

It is error and in violation of the provisions of the Act for the court itself to weigh evidence. (Point V of the Argument, p. 94.)

VI.

It is error for a court to treat its jurisdiction in reviewing findings and orders of an administrative board as co-extensive with, similar and analogous to its judicial authority in legal proceedings, as upon appeal from court to court. And it is error for the court in such proceeding not to confine its jurisdiction to that granted by statute or based upon its inherent jurisdiction to afford due process. (Point VI of the Argument, p. 95.)

VII.

It is error for a court to set aside the order of an administrative board because of failure of the board to designate a Trial Examiner for a second hearing, other than the one who conducted a first hearing. (Point VII of the Argument, p. 98.)

BRIEF.

Opinions of the Circuit Court of Appeals.

There are two opinions of the Circuit Court of Appeals dealing with the subject matter of this litigation, which are reported in *151 Fed. (2d) 854* and *123 Fed. (2d) 215*, respectively.

Jurisdiction.

This court has jurisdiction of this cause forasmuch as it, on April 22, 1946 (66 S. Ct. 958, Advance Sheets, May 15, 1946), pursuant to Section 240, Judicial Code, 43 Stat. 938, Title 28, Section 347, U. S. C. A., issued its writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, bringing to this court, for unrestricted review, the record in an original proceeding in such Court of Appeals, there entitled *Donnelly Garment Company v. National Labor Relations Board*, No. 12641, reported in 151 Federal Reporter, 2nd Series, 854.

Summary Statement of the Matter Involved.

Parties.

Parties to the proceeding are the National Labor Relations Board, herein called the Board; Donnelly Garment Company, herein called the Company; Donnelly Garment Workers Union, herein called the plant union, and International Ladies Garment Workers' Union, herein called the International.

Nature of the Proceedings Before the Court of Appeals.

The proceeding before the Court of Appeals was, under the provisions of the National Labor Relations Act (herein called the Act), upon the petition of the Employer (A-1) to review and set aside an order of the Board entered June 9, 1943 (50 NLRB 241, Rec. Vol. A., p. 618), which Board order required the disestablishment of the plant union, the abrogation of its contract with the Company and discontinuance of certain unfair labor practices. The Board, in its answer, prayed the Court to approve and enforce said order (A-361). The plant union and the International, each by leave of court, intervened (A-368-369), 49 Stat. 926, Title 29, Sec. 160, par. (c) and (f).

Some Detail Concerning Nature of the Proceedings.

The Board, upon charges filed, issued, on April 27, 1939, its complaint against the Company charging it with unfair labor practices as therein specified within the meaning of Section 8 (1, 2 and 3) of the Act and other provisions of the Act. Extended hearings (the record contains more than 5,000 pages) were held. The Board sustained the charges of unfair labor practices, disestablished the plant union, abrogated the contract between that union and the Company, and made incidental provisions for enforcement of the Board's order (A-552). On petition by the Company to review the order of the Board, the Court of Appeals (*Donnelly Garment Company v. National Labor Relations Board*, 123 Fed. (2d) 215) set aside such order because of what the court termed "defects in its procedure caused by the failure of the trial examiner to receive admissible evidence." (123 Fed. (2d), l. c. 225, par. (16).) Accordingly, the proceeding was re-

manded to the Board for the taking of additional testimony.

Pursuant to the court's mandate, the Board vacated its findings and order of March 6, 1940, and proceeded with further hearing, receiving the evidence rejected at the first hearing, for the rejection of which the court had set aside the first order (Vol. 10-3785). The Board made practically the same findings and entered practically the same order as it had found and entered previous to the court's remand (A-618-622).

Preliminary and Herein of Petitioner's Method of Submission.

Petitioner's ultimate submission is that judgment should be entered herein by this Court, denying the petition of the employer to review and set aside the order of the Board (A-552) and granting the request of the Board to enforce said order (A-617) or, the equivalent thereof, sending the case back with specific instructions for the Court of Appeals to enter such judgment. Whether the opinion of the Court of Appeals and its judgment pursuant thereto, contains reversible error, as such term is ordinarily used in appellate practice, is incidental to the subject matter now before the Supreme Court as contrasted with the primary question of what should be the judgment of this Court, whether the order by the Board should be set aside or enforced.

Manifestly, the reasons embraced within the opinion of the Court of Appeals as to why the order should not be enforced should and will be met by petitioner, but met as fallacious arguments against enforcement of the order. This method of submission is justified, if not required, because:

The Supreme Court on certiorari under Judicial Code 240 and pursuant to its general authority to issue writs

(Judicial Code 262) has authority to treat the case in this court practically *de novo* upon the record made below.

Distinctly and clearly, the Act of March 3, 1891, "was intended to vest in this Court a comprehensive and unlimited power" (*Forsyth* v. *City of Hammond*, 166 U. S. 506, 17 S. Ct. 665, l. c. 668); the power is wide, "this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all courts of appeal" (same citation, l. c. 669). See, also, *The Three Friends*, 166 U. S. 1, 17 S. Ct. 495:

> "We reaffirm in this case the proposition heretofore announced, to-wit, that the power of this court in certiorari extends to every case pending in the Circuit Court of Appeals and may be exercised at any time during such pendency * * *" (Forsyth, 166 U. S. 506, 17 S. Ct., l. c. 669).
>
> "The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein." (Forsyth, l. c. 668.)

In the late case of *Ex Parte Quirin*, 317 U. S. 1, 63 S. Ct. 1, this Court, by certiorari, brought before it for final action, and itself made final disposition of a case pending in the United States Court of Appeals for the District of Columbia.

It is pursuant to such principles governing the scope of judicial authority on certiorari that petitioner treats the subject matter primarily as if it were *de novo*.

STATEMENT OF EVIDENCE SUPPORTING THE BOARD'S FINDINGS.

The Board's findings that the company has engaged in unfair labor practices in contravention of Section 8 (1), (2), and (3) of the Act, are supported by substantial evidence and sustain the Board's order.

The record in this case is such that it should be unnecessary for us to marshal the facts to sustain the conclusion that the Board's findings upon which its order was based are supported by substantial evidence.

The trial examiner's intermediate report (R. X, 3848-3889), as adopted by the Board in its decision, is so clear and well reasoned and so well fortified with record facts, and so well briefed with case law, that it seems presumptuous to argue in its favor before this Court.

In the opinion of the Court of Appeals, written by Judge Sanborn, the facts found by the examiner, as set out in pages 8-25, Volume XIII, beyond all cavil, show that the findings of the trial examiner are supported by substantial evidence. Neither in this case nor in the prior case has it been suggested in the opinion of the court that there has not been substantial evidence in the record to support the findings of the trial examiner. On the contrary, Judge Sanborn in his opinion in this case (R. XIII, p. 37) says:

> "The picture drawn by the International and the Board is that of an employer which, solely because of hostility to the International, has influenced and coerced its employees into forming a plant union and entering into a closed-shop agreement, thus depriving them of their freedom of action and choice and making them, in effect, the bondservants of their employer."

The judge then proceeded to describe the picture presented by the Company and the plant union and thereafter the judge very properly said (R. XIII, p. 37):

> "The question as to which is the true picture, insofar as that presents a question of fact, is not a matter with which this court can concern itself."

That language comes very nearly holding that the findings of the examiner in this case were supported by substantial evidence and that the Board's order would be enforced were it not for certain proceedings which the judge held to be erroneous and to amount to a denial of due process.

Early in 1934 the International opened an office in Kansas City, Missouri, and publicly announced that an effort would be made to organize the workers in the garment industry in that city. Almost immediately the Company became active in opposition to the International and particularly to the effort of the International to organize the workers of the Company, and that opposition continued down through the period of time covered by the hearing before the Board; to-wit, July 15, 1939.

Chronologically the said opposition of the Company falls into three eras, (1) from the advent of the International in Kansas City, in 1934, to July 5, 1935, the effective date of the National Labor Relations Act; (2) the period from July 5, 1935, the effective date of the Act, down to the date of the formation of the plant union, April 27, 1937; (3) the period from the date of the formation of the plant union to the last day encompassed by the evidence in the hearing before the Board.

(1) Company's opposition to the International and unions in general prior to the effective date of the National Labor Relations Act.

In the following statement the references preceding the semicolon are to the pages of the Record where the findings in the Intermediate Report, which were adopted by the Board (A 618), appear; references following the semicolon are to the pages of the Record where the supporting evidence appears.

Prior to 1934 no effort had ever been made to organize the employees of the Donnelly Garment Company. In 1934 the International established an office in Kansas City, Missouri, and announced in the papers that an attempt would be made to organize the garment workers of Kansas City (X 3859; IV 1307-1312). On March 15, 1934, the International held an open meeting at the Musicians' Hall, to which all of the employees of the Company were invited. Another similar meeting was held at Eagles' Hall on December 4, 1934. On both occasions the Company's supervisory force attended the meetings in a group, including the production manager, personnel manager, and many of the instructors whose supervisory capacity in the Company's plant is hereinafter discussed. (X 3859-3860; III 1033-1034, 1102, 1104, 1058, 1105-1106, 1113.)

During 1934 at least a dozen of the Company's employees joined the International (X 3860; III 1033, 1036, 1037, 1043, 1047, 1052, 1098; IV 1120-1120-b, 1120 mm-1120 rr, 1120 vv, 1140-1141, 1153, 1156-1157). Employees who were observed attending meetings and others were called to the office where Production Manager Reeves questioned them about their interest in the union, reprimanded those who had joined, and warned others that joining would do them no good (X 3860; I 306-308; III 1035-1036, 1044-1046, 1052-1055, 1067-1068, 1073-1074, 1076,

1079-1087, 1141, 1153-1154, 329). Mrs. Gray, manager of the Company's retail outlet store (X 3860, IX 3336, X 3572, 3644-3645), told an employee that it was a "shame" that she had joined the ILGWU (X 3860; III 1088-1089). Production Engineer Dewey Atchison asked employees why they did not come to the Company instead of "going down to a bunch of foreigners" (X 3860; III 1068; IV 1331), advised against "getting messed up" with the union (X 3860; III 1100-1101), and warned that they would be fired if they did (X 3860; III 1101-1102). The instructors who at that time unquestionably had power to direct, discipline, and recommend the discharge of employees, also warned employees that those who joined the ILGWU would be discharged and urged employees not to give their money "to those foreigners" (X 3860; III 1047-1048, 1063, 1069, 1090; IV 1150-1151, 1323, 1325-1326, 1331). One instructor referred to the ILGWU members as "scum" (X 3860; III 1070; IV 1331).

A substantial number of the employees who joined the ILGWU were laid off or discharged shortly after joining. In June, 1934, about a dozen employees attended a dinner at the home of Mrs. Yarnell, an employee who had joined the ILGWU, for the purpose of discussing that labor organization (X 3860-3861; III 1036-1037, 1046-1051, 1098; IV 1153). Mrs. Yarnell was discharged in July, 1934, although she had worked for the Company since December, 1924 (X 3861; III 1046-1049). Within a few months thereafter, all except one of the girls who had attended the dinner were either laid off or discharged (X 3861; III 1037-1040, 1042-1044, 1051). As a result of these lay-offs or discharges, the ILGWU filed a charge against the Company under Section 7 (a) of the National Industrial Recovery Act, alleging that eight employees had been laid off because they joined the ILGWU (X 3861; IV

1316-1317). A hearing of these charges was held in the spring of 1935, but, before a decision issued, the National Industrial Recovery Act was declared unconstitutional by this Court (X 3861; III 1032-1110a; IV 1318).

In the latter part of 1934 and the first part of 1935, all the remaining employees who were known to have joined the ILGWU were transferred from the Company's main plant to a temporary branch, and laid off when the branch closed down in June, 1935, despite the fact that most of these girls had several years service with the Company, whereas employees in the main plant with less service were retained (X 3861; III 1062-1066, 1073-1077; IV 1120uu-1120vv, 1126v-1129, 1130d-1130e, 1132-1136, 1156b-1157, 1323-1327, 1332-1334).

The Board expressly refused to make any finding as to whether the discharges and lay-offs were discriminatory (X 3860, note 25); however, it did find on the testimony of some of the employees, that as a result of the sequence of events above related, employees became afraid to join, admit their membership in, or discuss the ILGWU (X 3861; III 1044-1046, 1057-1048, 1080-1081, 1141-1142).

The Loyalty League.

In February, 1935, while the charges before the NIRA were pending, the Company formed what was called the Nelly Don Loyalty League, for the purpose of combatting the efforts of the International to organize the workers of the Company. The League and its officers continued to control and dominate the labor relations of the Company and its employees from its formation down to the formation of the Donnelly Garment Workers' Union in April, 1937, as will be shown as we proceed with this statement.

In February, 1935, a meeting of about fifty employees was held at the home of Mrs. Gray, manager of the Company's retail store (X 3861; IX 3336; X 3572, 3644-3645), at which time and place she and Mrs. Strickland, head of the Company's pattern department (X 3861; IX 3233; X 3850), formed the Loyalty League (X 3861; III 798d-798e; X 78, 3336, 3439). Within the next three days, membership cards were circulated and signed by substantially all of the Company's employees (X 3861-3862; III 798e), including all of the Company's supervisory employees, Sales Manager Keyes, Employment Manager Hyde, Production Manager Reeves and Production Engineer Atchison (X 3859, 3860, 3863; I 407; II 429, 431, 533, 551; III 1091, 1097, 1108, 1113, 1117). Mrs. Strickland, in circulating the cards, stated that Mrs. Reed "would close her doors before she would have a union shop, and we should sign these cards to keep our jobs, and keep us in work, because she would close the doors (X 3862; III 1078). Accompanying the circulation of the membership cards was the following statement (I 42; III 798d):

> "We protest against, and will resist, all attempts of outside interference with the business of said Company, or with our relations to the Company as employees.
>
> We recognize the fact that * * * we have had generous and fair treatment from Nell Don (Mrs. Reed), president of the Company, and we repose our confidence in her rather than in professional agitators who are sent here to create discontent among employees of the Company."

The League was formed and the said statement was circulated with the evident intent of interfering with and influencing testimony to be heard on the charges filed with the Board created under the National Industrial

Recovery Act and to bar the International from the plant (X 3861; IV 1316, 1317, 1318; III 1032-1110A). The said purpose was evidenced by the conduct of Mrs. Strickland in refusing to allow Virginia Stroup, who was president of the International local, organized among the employees of the Company, to become a member of the Loyalty League (X 3862; III 1078-1079). Virginia Stroup testified before the trial examiner at the first hearing with the following colloquy:

> "Well, the day that Mrs. Gray came over with Mrs. Strickland with the Loyalty League cards, * * * And Mrs. Gray was holding the cards in her hand just like that * * * Fan shape. And I asked Mrs. Gray what they were, and Mrs. Strickland took up the conversation then. She said that Mrs. Donnelly would close her doors before she would have a union shop, and we should sign these cards to keep our jobs, and keep us in work because she would close the doors and thus throw all the girls out of employment.
>
> So I started to take one of the cards like this, but she had her thumb holding it until I couldn't get it. She says, 'Virginia, we would like to have you in our organization, but you can't carry water on both shoulders.' She says, 'There are no dues in this Loyalty League, and you can't belong to an organization that you pay dues to and belong to the Loyalty League.'".

Meetings of the League were regularly held on the second floor of the building (X 3862; I 39-40, 309; VIII 2666; IX 3033, 3067). Notices of said meetings were given to the employees by the supervisory personnel of the Company, and over the Company's communication facilities (X 3862; I 308-309; III 1011; IX 3337, 3344, 3435).

Each section of the plant had a representative, elected during working hours by the employees in the section, to

represent them in the League (X 3862-3863, 139; II 378j-378r; III 798e; VIII 2888-2889; IX 3032-3033, 3114). The League had songs of loyalty and sponsored the wearing of pins bearing the initial "L" as a demonstration of loyalty to Mrs. Reed (X 3863; I 319-320; II 542; VIII 2581, 2608-2609, 2694, 2843; X 3572).

That the Loyalty League, organized as aforesaid by the management employees of the Company, and for the purpose of preventing any of the employees from joining an independent labor union, appeared in and dominated many situations involving labor relations of the Company and its employees, down to and through the organization of the Donnelly Garment Workers' Union, will abundantly appear as this statement proceeds.

(2) From the effective date of the Act to the formation of the plant union, July 5th, 1935, to April 27th, 1937.

From the time that the hearing of the charges against the Company, before the National Industrial Recovery Board, was ended by the invalidation of the NIRA, down to the early part of 1937, the International, so far as the Record shows, made no effort to organize the employees of the Company. But the Loyalty League was meeting and was on the job in promoting the objective of its formation, to-wit, to keep the employees out of an independent labor union (X 3864; IX 2607-2608, 3572).

Ross Todd, whom the trial examiner found to be "acting for and on behalf of the" Company (X 3858), early in 1937 was elected president of the Loyalty League. And from that time down through the period covered by the evidence produced at the hearings before the trial examiner, while parading under the disguise of representing the employees in their labor relations, she was in fact,

as will abundantly appear as this statement proceeds, working in the interest of the management.

On February 26, 1937, there appeared in the Kansas City Star an article stating that the ILGWU had announced a campaign to organize the Company's employees (X 3864; III 1019).

The Loyalty Petition.

On March 2, 1937, less than a week after the International had announced, as aforesaid, that it would again take up the business of organizing the Company's employees, two women from the shipping department, Mary Sprofera and Inez Warren on Company time, went through the entire plant, and from machine to machine, and circulated what has become known in this case as the "Loyalty petition" (X 3865); V 1623-1641; I 311-312, 354-354a; II 594, 602; VIII 2578, 4609-2615, 2637-2638; 2725). The Loyalty petition read as follows:

> "We, the undersigned, as members of the Donnelly Garment Company, wish to make it known we are positively happy and contented with the positions which we hold with the organization, and refuse to accept any labor organization. We are thankful for the real humanitarian interest extended by our employer, Mrs. Reed."

Three employees refused to sign; Elsie Greenhaw, for the reasons as stated by her (X 3865; II 377):

> "Q. Now, on March 2, 1937, when this so-called Loyalty petition was sent around, you declined to sign it? A. Yes, sir.
>
> Q. And you declined on the ground that it contained in it the statement 'and refuse to acknowledge any labor organization'? A. That is right. * * *

I felt, as an employee of the Donnelly Garment Company, I had a right to believe in a union, or not, as I pleased."

Sylvia Hull refused to sign the petition when it was first passed around among the sewing girls. She testified (V 1354-1355):

"Well, she (Mary Sprofera) came down through the section and had this petition and she asked us to read it over and then she said it was not compulsory that we sign the petition, and I read it over and it said that we were satisfied with hours and conditions in the factory, and I was not satisfied with the hours, and told her that I did not think that I would sign the petition. So we had talked among the other employees that if we did not sign this petition we would lose our jobs * * * (V 1355). Well, after she came through the first time and we did not sign, this other girl and I, then we decided that if we did not sign that that we— * * * The substance of it was that if we did not sign the petition we would lose our jobs. Then this same girl came back through the section a few days later and she said, 'I think I missed you girls when I came through the other day,' and I told her no, she didn't miss me, but I said that I would sign the petition then; and I told her that the reason I did not sign it was because we were working 53 hours a week and that I thought that was too much, but I signed it at that time. Then she (Mrs. Hyde, employment manager) called us down to the nurse's room."

"Q. How did she call you? A. Well, as near as I remember the instructor—they have a telephone in each section, the instructor told us to go down. Anyway we were called down.

Q Do you recall any further conversation upon this occasion when Mrs Hyde was present? Did anything else happen in this conversation in the nurse's room? A Yes; she called us down there and

told us that she intended to take our names off and we insisted that she leave the names on in order to hold our jobs and she said no, that she would not do that, so she did take our names off, and I told her then that that was too long to work, and she said well, that she didn't have any say as to the hours they worked and she said, well, we would just forget about that" (V 1355-1356).

Mrs. Hull did lose her job on April 23, 1937 (X 3870; V 1356).

Marguerite Keyes, at the time of the circulation of the said Loyalty petition, was the office manager, and handled the finances of the Company (X 3640). A few days after March 2, Mrs. Keyes was in Mrs. Reed's home, who showed her the petition. Mrs. Reed told her that she would like to have the petition one hundred per cent. She testified (X 3641-2):

"Q. Who was not on the petition at that time? A. Well, I know they didn't have the officers and some of the executives of the Company. I don't recall just the people that were not on there; however, I do know they didn't have the tenth floor.

Q. What did you do after that, in that respect? A. Mrs. Reed told me she would like to have that petition one hundred per cent, and whether I went back to the office that day or not, I do not recall; but the next day I did suggest to one of the girls in the office that she take this petition around and have it signed.

Q. Who was that girl? A. Pauline Shartzer.

* * * * * * * * *

Q. Was she in the department of which you were the head? A. Yes, she was.

Q. Do you know whether Pauline Shartzer did circulate the petition then? A. Yes, she did."

As a result, everyone in the plant, including the full supervisory force, watchmen, porters, maids, stenographers, indeed, every employee except the three heretofore mentioned, signed the pledge (X 3866; A 388; IV 1288-1289; V 1643-1649; VII 3432-3433; VIII 2947-2955; IX 3335; X 3642-3644). The examiner found and the Board approved that under all the circumstances the Company, by permitting Mary Sprofera and Inez Warren, and requesting Pauline Shartzer to circulate the pledges in the factory during working hours and by requesting that additional signatures be secured, gave approval and lent assistance and encouragement to the solicitation of the employees to pledge themselves not to join the International, and thereby interfered with, restrained and coerced them in the free exercise of a collective bargaining agent (X 3866).

Every time the International got any publicity with reference to organizing the employees of the Company, the Company's officials and supervisory family got busy in an effort to check the International.

The March 18th, 1937, Meeting.

On March 6, 1937, the Kansas City Journal-Post carried an article stating that David Dubinsky, president of the International, at a meeting of 700 union members in Kansas City, had officially launched a movement to organize employees of the Company (X 3866; III 1021). The International, on March 9, 1937, sent the Company a letter requesting a bargaining conference (X 3866-3867; III 1022-1024). The Company did not reply to that letter, but Mrs. Reed, president of the Company, on March 18, 1937, read the letter to a mass meeting of employees called by the subservient company-organized and dominated Loyalty League (X 3867-3869; I 48-49, 147-148, 310, 354b-354c; II

588; VIII 3620). Rose Todd, president of the League, called the meeting. Rose Todd presided at the meeting. Chairs for the meeting were rented from the Kansas City Chair Rental Company and paid for by the Loyalty League (X 3867; I 44i, I 334w, 345; III 960, 962; V 1621). The meeting was held during working hours in the building in which the plant was located (X 3867; I 308-309; IX 3328-3330, 3438, 3454, 3457-3458; X 3575, 3666). Most of the supervisory force were in attendance at the meeting, including Ella Mae Hyde, employment manager; Martha Gray, outlet store manager, and Elizabeth Reeves, merchandise manager, and the instructors and thread girls. (X 3867; I 309-310; II 534; IX 3328-3329, 3438). The principal business of the meeting was the reading of the letter of March 9 from the International, by Mrs. Reed, and a speech by Mrs. Reed in which she stated that the Company was going to devise ways and means of protecting the employees from the violence which she attempted to lead the employees to believe was about to descend upon them at the hands of the International. She stated that she was not going to permit "Dubinsky or any other buttinsky" to intimidate her or the Company into forcing the employees to join the International against their will." She spoke of the so-called "Loyalty Petition," which had been circulated in the factory on March 2, and which stated, among other things, that the employees "refused to acknowledge any union labor organization," as follows:

> "I have had lots of nice things happen to me in my lifetime, but have never had anything that made me so proud and so happy as the list of names that came to my house" (X 3867-3868; III 1029-1030).

The examiner found and the Board approved (X 3868-9):

"Through the presence of supervisors and the sponsorship of the League, which had for its purpose the exclusion of outside union organization for the factory, the employees must inevitably have been aware of the anti-union character of the meeting and could not have been free to express their independent views. * * * Mrs. Reed's remarks indicated that the ILGWU was the common enemy of both the respondent and its employees. * * * While Mrs. Reed sought to appear as a disinterested defender of the respondent's employees in the exercise of their right to join or not join a labor organization, against the background of the respondent's widely publicized hostility to the ILGWU and the past repeated reminders to the employees that "loyalty" to the respondent demanded repudiation of outside union organizations, the undersigned is convinced that Mrs. Reed's remarks made it plain that the respondent's attitude toward unionization had not changed, and the membership of any of the employees in the ILGWU was not to be tolerated.

The undersigned finds that by the sponsorship and domination of the March 18 meeting and by Mrs. Reed's talk at said meeting, the respondent interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

The April 23rd, 1937, Demonstrations.

On April 22, 1937, a local newspaper carried an announcement by the International that Sylvia Hull, one of the Company operators, had been named as a delegate to the bi-annual convention of the International at Atlantic City (X 3869; III 1015). On the next morning, from the time Mrs. Hull arrived at work until she was removed

from her machine by Mrs. Hyde, employment manager, she was subjected to a continuous anti-union demonstration (X 3869-3870; II 535, 541-542d; IV 2339; V 1350; IX 3013-3015, 3475-3480; X 3517). Although Mrs. Hull sat at her machine sewing and did nothing to provoke any hostility, girls from all over the plant came in groups to her place of work on the 8th floor of the plant (X 3870; IV 1340-1343, 1349-1350; VIII 2656-2657, 2693, 2926-2927, 2991-2993; IX 3013-3015). They told Mrs. Hull that she could not belong to the International and demanded that she surrender her Loyalty League pin (X 3870; IV 1346-1347, 1349; IX 3013-3014, 3036, 3042-3043). Some of the girls stood on nearby tables (X 3870; V 1346-1347). They sang songs and booed (X 3870; V 1346; VIII 2665, 2693; IX 3419-3490). Although Mrs. Allison, instructor of the section in which Mrs. Hull worked, was present throughout the demonstration, she did not order the girls back to work or take any kind of action (X 3870; II 663-664; V 1341-1350; X 3573). After the demonstration had continued for sometime, Employment Manager Hyde appeared. After watching the demonstration for a short time she ordered the girls to return to work; when they refused to do so, she removed Mrs. Hull from the floor and sent her home (X 3870; II 535-536; IV 1340; V 1343, 1356-1357; X 3517, 3573).

On the same day Fern Sigler came to work for the first time displaying her International membership pin and also wearing a Loyalty League pin (X 3870; I 319). She was subjected to a demonstration similar in character to that to which Mrs. Hull had been subjected (X 3870; I 70-72; III 315-316, 321-322; X 3666-3667). Mrs. Sigler attempted, throughout the demonstrations, to continue sewing, and even when Production Manager Batty, accompanied by Rose Todd, ordered Mrs. Sigler to his

office, she expressed the desire to remain at her work (X 3871; II 442-445, 497-499). Beatty, however, commanded her to go to his office and she complied (X 3871; II 444).

The Inquisition of Fern Sigler in the Company's Office Presided Over by Rose Todd (April 23, 1937).

In the office Mrs. Sigler was confronted by Rose Todd, president of the Loyalty League, and as the Board has found, a representative of the management; Lee Batty, production manager, and Ella Mae Hyde, employment manager, all of whom took her to task for joining the International. Miss Todd took charge of the inquisition and in the presence and with the approval of Batty and Hyde, she proceeded to tell Mrs. Sigler what the Company's policy was with reference to labor unions (X 3871; III, 801-807). Rose Todd, at that inquisition, speaking to Mrs. Sigler, said:

"R. Todd (III 803): What do you think you have gained that we haven't by joining the union?

F. Sigler: Shorter working hours.

* * * * * *

R. Todd: Nobody is going to do any violence against you. If you want to go home, all right. You got yourself in it and you can stay in it or get out if you want to get out. As president of the Loyalty League, I am not going to try to sell you on the idea that we are right, but the majority will certainly rule in a case like this. You expect the majority to rule if they believe like you; we expect it to rule when they believe like we do. We have had no violence and we don't intend to have any violence.

R. Todd (III 805): Did you join because you really wanted to join?

F. Sigler: Yes, I certainly did. I have a mind of my own and I don't let anybody control it.

Mr. Baty: Do you think the union will give you better working conditions and better treatment personally?

F. Sigler: I wouldn't say. I don't know.

Mr. Baty: The thing that I am interested in is that if there are any particular conditions here that are not right, I want to correct them.

R. Todd: It has always been the practice here that if we had any complaints to make, we made them. If we don't make them we certainly can't straighten them out.

F. Sigler: You can do things I don't have the authority to do.

R. Todd: I have no authority * * * My advice to you is, if you feel that strongly about the union and have enough people to back you up, be in a union shop. I wouldn't any more think that I could join the union and get by with it than the man in the moon. I'd expect to be put out in the street and left there. You can't expect any organization to revolve around one or two people. There are 1,200 of us. I have no way of knowing how many of you there are but it is very evident that it is not a majority. I talked to some of the girls last night and asked them to be quiet about it and they went away thinking they would. When they all got together they couldn't stand it. What do you think you had better do?

F. Sigler: I don't know.

R. Todd: Didn't you expect this to happen when you told everybody you belonged to the union?

F. Sigler: I didn't see why it should.

R. Todd: Did you think you had enough people here to back you up? What did you expect? I never tried anything in my life the majority didn't rule. We went downstairs and sent those girls back to work and they went back to work.

F. Sigler: Didn't I have a right to join this union? As long as I don't bother anyone, what business is it of theirs if I belong? * * *

R. Todd (III 807): We are going to run an open shop as long as the majority feels that way. The majority is going to rule, as always.

Mr. Baty: I am going to ask you to go home temporarily and Mrs. Hyde will call you back when I think it is safe for you to come back."

Mrs. Sigler never did go back to work for the Company.

Mrs. Hull never did go back to work for the Company.

The examiner found and the Board approved:

> "That the respondent approved of and encouraged the demonstrations and took advantage of them to reveal once more to the employees its hostility to the ILGWU and its support of anti-ILGWU activities. Further, that by such acts the respondent interfered with, restrained and coerced its employees of the rights guaranteed by Section 7 of the Act" (X 3871).

Heretofore in this statement we have marshaled evidence from the record tending to prove that the Company, since the advent of the International into Kansas City in early 1934, has been constantly on the alert to keep the International out of the Company plant.

First, by acts preceding the effective date of the Act, such as the surveillance of meetings held by the International in Kansas City, by discharging and otherwise disciplining employees who joined or favored the International, by supervisory employees disparaging and belittling the International and its officers.

Second, by the formation of the Nelly Don Loyalty League in February, 1935, while the charges of the International against the Company were pending before the National Industrial Recovery Labor Board, for the avowed purpose of keeping the employees of the Company out of the International and out of any labor union.

Third, by the circulation of the so-called "Loyalty Petition" on March 2, 1937, following publicity to the effect that the International was preparing to organize the employees of the Company, which petition stated that "We * * * refuse to accept any labor organization."

Fourth, by holding a mass meeting on March 18, following further publicity to the effect that the International was preparing to organize the employees of the Company, at which mass meeting the president of the Company made a speech disparaging and belittling the International and its officers and attempting to frighten the employees into believing that the International was intent upon doing violence to them, and by praising the employees for signing the Loyalty pledge "refusing to accept any labor organization."

Fifth, by staging and encouraging demonstrations on April 23, 1937, around the machines of two girls who had joined the International and by severing the employment of said girls with the Company.

(3) The Formation of the Plant Union.

We now come to the culmination of all of the events heretofore described to the objective of the Company's anti-union, anti-International policy, the formation of the Donnelly Garment Workers' Union, herein called the plant union.

The plant union was conceived by, organized by, financed by, and it has been controlled and dominated by the Company.

Prior to April 12, 1937, the date upon which the Supreme Court upheld the constitutionality of the National Labor Relations Act, the Company had evidently assumed that the Act would be declared unconstitutional for it conducted its labor relations just as though the Act were

not in existence and as though it were no protection to the employees, against discrimination because of union activities, and no protection to them and their right to join labor organizations of their own choosing (X 3872 3873; III 824).

Three employees, including Miss Todd, employed an attorney, Mr. Frank Tyler. They paid him a retainer fee of $500, as they stated, to bring some sort of an injunction suit against the International. On April 1, 1937, Rose Todd went to the First National Bank in Kansas City, Missouri, and borrowed $1,000 upon the unsecured note of the Nelly Don Loyalty League, and deposited the money to the account of the Loyalty League in said bank. She, as president, and Pauline Hartman, as the treasurer of the Loyalty League, issued a check on said account in the name of the Loyalty League for $500, which they gave to Mr. Tyler (X 3872; II 556-577; III 959; I 179; II 378i-378q; III 949). No such injunction suit was ever filed, but the $500 was kept by Mr. Tyler and applied by him on his fee for his help in organizing the plant union (X 3785, Note 44; III 927-928). At the meeting of the group chairmen of the plant union, on June 15, 1937, as shown by the minutes of said meeting, the following colloquy occurred:

> "Q. I understand people are saying that we paid Mr. Tyler $500 to organize our union?
>
> Rose Todd: As you know, and as we have explained quite thoroughly, we paid Mr. Tyler $500 retainer's fee. He helped us write our By-Laws and Working Agreement, and will advise us and help us when we need it."

The financial records of the plant union show that no other money was paid to Mr. Tyler after the check of April 1, 1937, until November 23, 1937 (X 3875).

On April 27, 1937, a meeting was held on the unoccupied second floor of the building in which the Company maintained its factory, at which meeting the plant union was organized. The employees were ordered to go to the meeting by their instructors and other supervisory employees. The meeting was held during working hours and the employees were paid by the Company for the time which they lost because of attending the meeting. Mrs. Lola Skeens testified at the second hearing in 1942 that at the time of the organization of the plant union, and for a long time prior thereto, she was in the employ of the Company as an instructor; that she was so employed for 15 years prior to leaving the Company on September 19, 1941 (IX 3426). She testified (IX 3420):

> "Q. Did you attend the meeting at which the Donnelly Garment Workers' Union was organized? A. I did.
>
> Q. Did you know before you got to that meeting that a union was going to be formed at the meeting? A. I did.
>
> Q. How did you learn of that? A. Mrs. Wherry told me. (Mrs. Wherry was factory-manager.)
>
> Q. Do you know how the girls working in your section learned of the meeting? A. I told them . . .
>
> Q. At what time of day was the meeting held? A. I am not sure what exact time. It was around 2:30, I think.
>
> Q. Did the girls in your section wear their uniforms to the meeting? A. Yes.
>
> . . . . . .
>
> Q. Did you go to the meetings with the girls in your section? A. Yes, I did.
>
> Q. Did you sit with them at the meetings A. Part of them.
>
> Q. Were the girls in your section paid for the time they spent at that meeting? A. They was.

Q. Was an entry made on the girl's card to show she was to be paid? A. There was.

Q. Did you see that entry? A. Yes."

Mrs. Etta Dorsey, an instructor in the employ of the Company from October, 1927, to March, 1942, gave similar testimony (IX 3329).

Typewritten minutes kept by the plant union of the meetings and typewritten minutes kept by the group chairmen of the plant union, were subpoenaed at the first hearing in 1939, and they appear in Volume III of the Record, on page 821 through 946. Much of the evidence supporting the facts found by the examiner are contained in those written minutes kept by the plant union itself.

The minutes of the meeting of April 27, at which the plant union was organized, appear in Volume III, pages 821 to 830, inclusive. They show that the meeting was presided over by Rose Todd, who was at said time the president of the Loyalty League. The first addressed the meeting in part as follows:

> "I believe everyone is present and it certainly is a very gratifying sight to see this many of us together again.
>
> As chairman of the committee of employees, I have called this meeting this afternoon to discuss a matter of vital importance to us as employees.
>
> Several weeks ago it seemed to me that it was necessary to obtain some legal advice for us. After considering where we could obtain that advice we decided to ask Mr. A. Gossett and Mr. F. E. Tylor to act as attorneys for the employees.
>
> I have known Mr. Gossett and Mr. Tyler personally for years. More and more these past few weeks it has seemed to me that we are approaching a time when it will be necessary to form an organization that will give us the protection that we need,

Your first question no doubt is, 'Won't the Loyalty League do that?' My answer is, 'It will not'—because the Loyalty League is purely a social organization that we want to keep alive and going, and this will be a business organization to take care of our problems and give us representation to definitely confer with the proper representatives of our Company at times when we feel that it is necessary * * * We have been trying to think of a name to call this organization, because as many of the details as we can should be worked out today. I have this suggestion to make (and we have also talked this over with Mr. Tyler), and we have agreed that it is a good one. Our new organization will be called DONNELLY GARMENT WORKERS' UNION * * *

My first personal distress was the use of the word 'union.' You probably do not like it any better than I did but you must see by this time that to meet the demand that can be made by outside unions that our organization will have to be a union.

* * * * * * *

Now, Mr. Tyler is here with us this afternoon, and I am going to ask him to make a little explanation to you and to talk to you for a few minutes. Mr. Tyler.

Mr. Tyler: Ladies and Gentlemen. I am appearing before you in a rather unusual position this afternoon. Some weeks ago several employees came to my office and employed Mr. Gosseft and myself as legal advisors of the employees, so that I am, in fact, at this moment, acting as attorney for you or for many of you, even though you have never seen me before * * *

I am not here to discuss the question of whether a labor union is or is not a good thing. You may believe in unions or you may disbelieve in unions, and still agree with the advice I am now about to offer you."

He then proceeded to advise the employees to form an unaffiliated plant union:

(824) "I do not think this action can or will be considered as any act of unfriendliness to your employer. I believe they recognize your right to take this step, and that it isn't an unfriendly act to them. In fact, it is much better for them and for yourselves, for you to have your own union with your own representatives, rather than have a group here trying to represent outsiders from New York and another group here representing some other outside union, etc. * * *

If your verdict is in favor of the formation of that union, I should then like to present a brief form of by-laws and recommend them to you. They would, of course, be subject to your change when and if you see fit."

The By-Laws were read and unanimously adopted without argument or comment; and have never been changed. Rose Todd then resumed speaking, as follows (826):

"While we are together as an entire group of employees let's form this organization. I want to ask, then, for a motion to be made that we form a union at this meeting."

The minutes show (page 826) a motion made by Ethel Reigel that "We form an independent, unaffiliated plant union at this meeting." Seconded by Arch Lyle.

"All in favor make it known by saying 'I.'" (Unanimous.)

"That was very gratifying to me and I am sure it will be to each one of you. The next thing we should take up, and I should like to ask for a motion to be made that we select or appoint a nominating committee to retire from the room and take enough time,

any amount that is necessary, to bring back to us a group of chairmen to act as officers for our union."

(Motion made by Lena Faulconer that a nominating committee be appointed to select a general chairman and eight group chairmen to represent our independent union to act as officers of our union. Seconded by Eva Lieberman.)

"All in favor make it known by saying 'I.'" (Unanimous.)

Whereupon Rose Todd proceeded to appoint a committee of five. Miss Todd then requested the nominating committee to retire from the room after instructing them how to spread the group chairmen through the various departments of the plant. She stated:

"I am going to ask this committee of five people, with Mrs. Riggs acting as chairman, to leave the room —I think the best place for you would be the Recreation Room on the third floor. (The Recreation Room was a part of the Company's plant.)"

Thereupon Rose Todd caused the membership cards, which had been specially prepared in advance for the meeting, to be passed among the employees present. She said:

"I have a card here that I am going to read to you, and after a while I am going to ask Mr. Tyler to read to you the By-Laws that he has drawn up for us to use for our union organization and it may be that those things will be changed a little, but we could not very well have this meeting today without having our By-Laws read to us. I am going to ask the boys to pass these cards out and they will take them up later during the meeting. (Reading) I here-

by agree to become a charter member of the Donnelly Garment Workers' Union, and to abide by its By-Laws and regulations.

This is not just for fun, it is all business now. Any of the cards that you do not pass out, please bring back to the platform. Do not take any of these up yet. I am going to ask you to be patient as the meeting goes along because we have several things yet to take care of. Remember, you do not have to sign these cards unless you want to."

Miss Todd then requested Mr. Tyler to read the By-Laws.

"Mr. Tyler: I wish you would keep in mind as I read these By-Laws that the last thing I want to do is cram anything down your throats if you don't want it. These are your By-Laws, and your union—not mine. If you want to you can decide that a woman has to wear a striped dress or a polka dot scarf to belong to your union, and because we decided to take prompt action does not mean that we are trying to force you to agree to anything. I do suggest, though, that if we tried to discuss the individual viewpoints of each of you we would be here next Monday morning. If these will do at all temporarily, I hope you will adopt them and later talk them over. I assure you that a majority of you may amend them, whenever you make up your minds to do so. I suggest you adopt them and then leisurely amend them when the majority of you wish them changed."

(The minutes of the meeting of the plant union immediately following on May 11, 1937 (III 836), contain the following:

"Question: If a new employee comes in are you going to set a time before they have to become a member of the union?

Answer: Anybody coming to work for us will join the union immediately. If there is any doubt in their minds about whether or not they want to join our union, then there is some doubt in their minds as to whether or not they want to work here."

(The closed shop contract was not signed until May 27, 1937.)

Mr. Tyler then proceeded to read the prepared By-Laws. He stated (III 829):

> "This union will not finance what some unions finance. You are not financing for the support of some strike in this, or some other city. In that case you don't need any large dues (25c per month in the By-Laws; which can possibly be reduced to 15c).
>
> I suggest that if the By-Laws are satisfactory someone move they are adopted."

(Motion made by Ellen Nokes that we accept the By-Laws as they were read. Seconded by Virginia White. Unanimous acceptance.)

Miss Todd announced the return of the nominating committee. Mrs. Riggs, chairman of that committee, reported the names of the nominees.

> "Miss Rose Todd: You have heard the names of the general chairman (Miss Todd), and the group chairman, which I will not repeat, but I will ask that a motion be made that these chairmen be accepted as a group."

(A motion by Hazel Sauke that we accept these chairmen as a group; seconded by Anna Reese. Unanimous decision.)

Miss Todd then proceeded:

> "I am going to ask at this meeting that each of these new chairmen come to the platform.
>
> Our meetings as an entire group of employees are not so frequent, and I thought it would be a very opportune time for me to present the new chairmen that will act as our representation at any time that is necessary."

The other meetings as an entire group of employees since February, 1935, had been of the Nelly Don Loyalty League.)

(Presentation of committee chairmen.)

"I want to ask everyone to remain seated now until we have taken up these cards, and have no one leave the meeting until we are dismissed. Will the boys please take up the cards now? Has everyone had a card? If not, please stand.

I have just a few words more that I want to say. If at any time you feel that there are little things going on that should be reported to the committee, please feel free to do so. Is there anything else that should come before this meeting? If not, the meeting will stand adjourned."

So was formed the Donnelly Garment Workers' Union.

May Stevens testified at the hearing in 1942 that she had worked for the Company off and on since sometime in 1932 until after the period covered by the evidence in this case (July 15, 1939).

On cross-examination by Mr. Tyler she testified as follows (Vol. X 3691-2):

"Q. When you stated this morning that you went along with the Donnelly Garment Workers' Union at the beginning because you thought it would mean your job, did you mean that you believed that at that time you would be discharged if you had not joined? A. Yes, that is what I believed.

Q. What did you base that belief on? A. The Fern Sigler incident.

Q. Did you believe that the overwhelming majority of the employees wanted this union and would get a closed shop contract, and for that reason you would have to join or lose your job? * * *. A. No, not in that sense of the word, about the overwhelming majority. It was because that we went in that meet-

ing unprepared, and they just as much as forced us to join it.

By Mr. Tyler:

Q. What do you mean by 'just as much as forced you to join it?'? A. We were handed cards and they told them to count them and see that every card was accounted for and handed back.

Q. And the fact that the cards were accounted for, in your mind, means that you were forced to join? A. Yes.

Q. Weren't you told in that meeting that you were to do as you pleased, and nobody was to sign a card that didn't want to, or if anybody wanted to think it over, he was to keep it? A. Perhaps so, but we knew differently."

Miss Stevens was then shown an affidavit which she, with other employees had signed, to the effect that she had joined the plant union of her own free will and accord.

Continued Cross-Examination by Mr. Tyler.

"Q. You have said you signed it? A. Yes.

Q. Was that statement true or false when you signed it? A. It was false, because it wasn't my free wish to join it, or what I chose to do of my free will.

Q. You understood that you swore to it at that time? A. Yes, but it wasn't my wish, because I called the Ladies' Garment Workers' that night and had them come out and signed the other card, the one that was of my own free choice.

Q. When did you again talk with the International Ladies' Garment Workers' Union? A. That night.

Q. You had never been in touch with them before? A. No, I called them immediately upon going home.

Mr. Hoggsett: What date is that? A. I believe I didn't make myself clear. The night the Company

union was formed, that was not my free wish, joining the Donnelly Garment Workers' Union, because upon going home that night, April 27, I called the Ladies' Garment Workers' Union and signed a card that night."

The By-Laws adopted by the meeting (X 4864; III 798F-799, 800) provided that members of the plant union "shall not be members of any other labor union."

On May 27, 1937 (X 3879; III 807-811), the Company and the plant union entered into a contract providing for a closed shop as follows (809):

> "The employer agrees that on and after June 5, 1937, no one of its employees shall be retained in its employ who is not a member of this union. It is further agreed that hereafter no person shall be employed by the employer who does not, at or prior to such employment, sign an application for membership in this union, and no such person shall be retained as an employee who shall not, within two weeks after such employment begins, be accepted by this union as a member.
>
> It is further agreed that no one shall be continued as an employee after such person shall have resigned from or ceased to belong to this union either by voluntary retirement or expulsion."

The door was now completely closed to the International. The By-Laws provided, among other things (X 3874; III 798F), that

> "The purpose of this organization shall be * * * the protection of employees and members of this union from coercion, intimidation, violence or threats of violence in order to force them to join unions organized and dominated by outsiders not employees in this plant."

Everybody in the plant, department managers, instructors, supervisors, with the exception of a half dozen executives, joined the organization at the meeting on April 27, or shortly thereafter (X 3875-3877; I 99, 131, 136, II 421, 424-424b, 428-429, 510, 715-716, 718d-718e, III 743-763, 830, 854, 865-866, 868-870, 875-882, 887, 891-894, 897-900, 909-911, 1003-1005, 1007, 1011, 1032, 1091, V 1349-1350, VII 2175, 2256-2257, VIII 2671-2672, 2676-2677, 2680, 2689, 2733, 2911-2912, 2914, 2949-2953, 2961-2962, IX 3157, 3316, 3426-3427, 3435-3436, 3445-3446, 3450, X 3644, 3649-3650, 3671, 3673, 3675).

Instructors and thread girls were supervisory employees.

The very large majority of the employees in the plant were sewing girls (I 137), or rather machine operators (in 1939 there were 642), divided into sections with forty operators each, and one instructor, and one thread girl, who the Board found, and who the evidence abundantly shows, was an assistant instructor and supervisor. In 1939 there were forty-four instructors (III 138). The instructors and supervisors all joined and remained members of the Union (I 138).

The Company and the Plant Union contended that the instructors and thread girls were not supervisors, that they had no authority to either supervise or discipline any of the machine operators or other employees. The proof that they were supervisors, and as such representatives of the management at all the times covered by the evidence before the Board in this case, was overwhelming (X 3851). It is admitted that they were such until the advent of Baty into the plant in June, 1935, at which time he claimed to have taken away from them all of their supervisory authority (IV 450-451). The Board found that it is plain from all circumstances disclosed by the record

that after June, 1935, the instructors and thread girls continued in their capacity as supervisors in charge of the operators who worked in the various sewing sections of the factory (X 3851).

Elizabeth Reeves, production manager until succeeded by Baty on June 30, 1935, testified in the N.I.R.A. hearing in 1935 (R. III 1060), as follows:

> "Nobody is let out of the Donnelly Garment Company unless four people pass on it. After we decide that we have to lay off a certain group or a number of people, we go over our records with the instructor and she makes the recommendation, because she is in close touch with the operator and knows the type of work the operator does and whether she is efficient, obedient, cooperative and reliable. After the instructor makes that selection it is checked by Mrs. Wherry, who is in charge of our factory, who knows what is going on in every section of the place. * * * I expect certain things of those instructors; they have to get out a certain quantity of work in order to make our factory efficient and I certainly expect to get out quality. Well, I cannot expect them then to keep people in their sections that won't cooperate and won't help them to maintain the quality and standard of our work."

That testimony was given at a hearing when there was no issue as to the supervisory capacity of instructors and thread girls. Of course, if the instructors and thread girls, at the time of and following, the organization of the Plant Union, had the authority described by Mrs. Reeves in her 1935 testimony, there could be no defense to the charge that the Plant Union was Company-dominated and controlled. But, Lee Baty, who became production manager in June, 1935, testified (II 450) as follows:

"By Mr. Ingraham:

Mr. Baty, after you took charge of the production of the factory, did you make any changes in reference to the method of production, or the plan of work? A. I did.

Q. I direct your attention to the work of the instructors. What, if anything, did you change in regard to their duties? A. I changed the work of the instructors, I would say, to a very great extent. Prior to the time I took them, they were considered more or less supervisors, and entered into the discussion and recommendations as to the ability of different operators and made different recommendations as to which operators would be recalled after they were laid off, and after I took over the plant, I put instructors strictly on a basis of an instructor, and they were there to assist the operator in the performance of their work and nothing else. They had no supervision over the girls, and it was none of their concern as to how the girls performed. They were to give them the work, take it away from them when it was finished, show them how to do it, if they didn't know how, and that was the extent that they were held liable for the girls in the section.

Q. Now, Mr. Baty, when did you put that plan into operation? A. That plan was put into operation, as near as I can remember, about the month of July, 1935."

Neither the Company nor the Plant Union put any instructor on the stand at either hearing who testified that her authority had ever been changed or lessened by Baty or anyone else, either in June or July, 1935, or at any other time. The Company called an instructor, Mary Copowycz, as a witness in rebuttal in 1942, after a number of Board witnesses (as hereinafter shown) had testified that no change had been made in the instructor's duties or authority since Mrs. Reeves' above quoted testimony. But they asked her no such question. The Board

put two instructors on the witness stand, who testified that they had been with the Company many years prior to the advent of Baty in 1935, and through the period covered by the testimony in this case, to-wit, July 15, 1939, and that their supervisory authority had never been changed by Baty or anyone else. Lola Skeens, produced as a witness by the Board, testified (IX 3426-3427, 3434) that she started to work for the Donnelly Company September 21, 1922, and that she worked there continuously as an instructor with the exception of the first three or four months, that she was off from work about two years following September 1, 1931. She testified (IX 3434):

"Q. Did you regard yourself as a supervisory employee? A. Yes.

Q. Why? A. Well, because I was in charge of them.

Q. Do you know whether the girls in your section regarded you as their supervisor? A. I think they did.

Q. What were your duties as an instructor? A. To plan the work and to give out work and to instruct them.

. . . . . .

Q. Did you go over the payroll cards weekly with the office? A. Yes.

Q. And you continued doing that the entire time you were an instructor prior to July 15, 1939, is that correct? A. Yes."

She further testified (IX 3435):

"Q. Was the thread girl in charge during periods when you were absent for an hour or two? A. She was.

. . . . . .

Q. Did you consult with your thread girl with respect to assignment of work? A. Yes.

Q. Did the duties of the instructor change at any time prior to July 15, 1939? A. No.

Q. Did the duties of the thread girl change at any time prior to July 15, 1939? A. No."

Etta Dorsey, produced as a witness by the Board, testified (IX 3274, 3324, 3325, 3326) that she was continuously an instructor in the employ of the Company from 1927 to July 15, 1939. She testified:

"Q. Did you regard yourself as a supervisory employee? A. Yes, I did.

Q. (IX 3325) Why? * * * A. Well, because we instructed the girls and we sort of led them right and wrong, and told them what they should do and like that.

Q. Could you state specifically what you were told by any representative of the Company as to your status as a supervisory employee? A. Yes, at one time there was a person told us that we should carry ourselves as their superior, and that they sort of held us on a pedestal, and we could just, well, shouldn't be just one of them, should be up above them, and carry ourselves that way.

Q. Who was that? A. Elizabeth Gates Reeves.

Q. Did you know whether the girls in your section regarded you as a supervisory employee? A. I think they did.

Q. Did you go over the payroll card weekly for the office prior to July 15, 1939? A. Yes, I did."

She testified (IX 3326) that the thread girls were in charge during the absence of the instructor. She testified (IX 3327-3328) that there was no change in her duties as an instructor, or of her responsibilities, from the time she went to work as an instructor in 1927, to July, 1939.

Geneva Copenhaver, produced as a witness by the Board, testified that she worked as a machine operator

for the Company in 1928 and 1929 (IX 3470), when she quit for a number of years, but went back in September of 1935 and worked in the same capacity until sometime in August, 1939. She further testified (X 3481-3482, 3483) that she considered her instructor a supervisor. She testified:

> "Q. Why did you consider your instructor to be a supervisor? A. Well, the instructor—everything that we—like changing a price on a ticket or anything like that, had to be O.K.'d by the instructor. The instructor always gave us our checks or had our checks brought to the section and she would pass the checks around from girl to girl, and more than one time when I was unable to be at work, I would call, and have talked to Mrs. Dorsey myself when I was working for her. I notified her that I wouldn't be able to be at work that day. She was in full charge of the section. The girls looked to her for everything in regard to work or anything that they might be in doubt about; it was always the instructor you went to about the work.
>
> Q. Did the instructors determine whether to divide the work and lay off girls when the work was slack? A. Yes, they did."

Bessie Weilert, produced by the Board as a witness, testified that she worked for the Company as a machine operator from 1934 down through the period covered by the testimony in this case (X 3550, 3554, 3555, 3556, 3557), and that the instructors were supervisors during all of that period and that their authority as such was never lessened.

May Stevens, produced by the Board as a witness, testified that she worked for the Company as a machine operator, intermittently from 1932 down through the period covered by the testimony in this case (X 3662).

She testified (X 3673) that she considered the instructors supervisors "because they had full charge of giving out the work and who they would give it to, and of laying off the girls or saying who would be called back."

She testified (3674):

> "Q. I want to ask: Did that condition with regard to the instructors' duties continue unchanged during the entire time you were working for the Donnelly Garment Company? A. Yes."

She testified (X 3679) about a meeting of the plant union which her instructor, Frances Morrison, thought she had not attended:

> "Q. Did your instructor check up on your attendance at the meeting? A. Yes, two or three days later.
>
> Q. What did she say to you? A. She came to me and asked me if I attended the meeting, that some of the girls in the section said I was on the floor when they came back and that I hadn't attended the meeting.
>
> Q. Who was the instructor who did that? A. Frances Morrison.
>
> Q. State what effect, if any, your instructor's inquiry about your attending the meeting had upon you with reference to your feeling free to attend or not attend subsequent meetings of the Donnelly Garment Workers' Union? A. Each time thereafter I went down with my instructor and always sat in the same row of seats that she did."

Frances Morrison was not introduced to refute that testimony.

From the minutes of a meeting of the group chairmen, on July 15, 1937, it appears that Hobart Atherton (X 3878; JII 927) stated:

"I think department heads, instructors, etc., should have all the privileges of membership except that they shall not be allowed the right to vote."

However, they did vote and did take active parts in the meetings during all of the time of the organization of the plant union through July 15, 1939 (X 3875-3877, III 743-763; Board's Ex. 1-0000, I 138).

Bessie Weilert testified (X 3554):

"Q. Did you ever see an instructor attend a meeting of the Donnelly Garment Workers' Union? A. Yes.

Q. Do you remember whether instructors continued to attend up to July 15, 1939? A. They were still attending the meetings when I quit for that year.

Q. Did you ever complain about instructors attending meetings? A. Many times.

Q. Why? A. Because I didn't think the girls felt free to talk before their instructors and I told Rose Todd many times I didn't think that that should be permitted."

From the foregoing it is apparent that there was abundant testimony to sustain the following finding of the trial examiner, approved by the Board (X 3851, 3852, 3853, 3854):

"It is plain from all the circumstances disclosed by the Record that after June, 1935, the instructors and the thread girls continued in their capacity as supervisors in charge of the operators who work in the various sewing sections of the factory. A number of the respondent's witnesses testified that instructors do not have the power to employ, discharge or discipline operators. There is substantial evidence, however, that they do perform functions which make them part of the supervisory staff.

> The instructors, assisted by the thread girls assume complete charge of and are fully responsible for their respective sections of the factory. Among the duties of the instructor is the assignment of bundles containing the materials and supplies upon which the operators work, and the transmission to the operators of the respondent's instructions for the performance of the sewing processes * * *. In addition to these duties the instructors perform other functions as the representative of the management. When work is slack in the section instructors determine who shall take a day off and in what order the operators will be released from the section. Although Baty denied that the instructors are charged with the duty of disciplining and reporting upon the efficiency of operators who work in their respective section, the evidence is convincing that they do so the same as before the advent of Baty as factory manager, in June, 1935. The instructor constitutes the link through which the operators learn the management's directions, and the management learns whether a girl is a desirable employee, her capacity for work, her attitude toward work, and her performance of the work.
>
> * * * * * * *
>
> (X 3854) On the basis of all the evidence the undersigned finds that instructors and thread girls are supervisory employees and that they act as representatives of the management in the factory.'"

We have gone into considerable detail with reference to the supervisory capacity of instructors and thread girls for the reason that they were, during all the time covered by the testimony, the immediate superiors, and supervisors of the great majority of the employees, to-wit, the machine operators, and for the reason that the evidence shows that the instructors notified the machine operators of the meetings of the Plant Union, and went to the meetings with them, and checked their attendance at said

meetings; and for the further reason that the instructors were at all times very active in the conduct of the affairs of the Union (X 3875, 3877; X° 3554, 3670, 3877, III 881-882, 1003-1005). Many other supervisors, managers, representatives of the management, were active in the formation of the Plant Union, and active from its formation on through July 15, 1939, in the conduct and control of the Plant Union.

Rose Todd Represented the Company.

We believe that from what has already been stated, it is apparent that the findings of the trial examiner, approved by the Board (X 3857-3858) was abundantly established by substantial evidence.

> "Irrespective of Todd's supervisory status, the undersigned is of the view that the evidence, as a whole, clearly identifies her with the management in the minds of the employees. The undersigned finds that Rose Todd occupied a close and confidential position with the respondent and further finds that in such position she was acting for and on behalf of the respondent."

Her control of the Loyalty League as president, at the mass meeting of March 18, 1937; her participaton in the inquisition of Fern Sigler, and her orders and directions to Fern Sigler and Sylvia Hull, on April 23, 1937; her employment of attorneys; and her conduct of the organization meeting of April 27, 1937; her statement as shown by the minutes of the meeting of the Plant Union on May 11, 1937 (III 836), in answer to the question propounded by one of the members:

> "Q. If a new employee comes in are you going to set a time before they have to become a member

of the Union? A. Anybody coming to work for us will join the Union immediately. If there is any doubt in their minds about whether or not they want to join our Union, then there is some doubt in their minds as to whether or not they want to work here."

The closed shop agreement did not take effect (III 809) until June 5, 1937.

Rose Todd went to St. Joseph, Missouri, on May 13, 1937, and organized the employees in the Company's branch plant in that city (III 836-837). She was asked how much time would be allowed before definitely stating whether or not they would join the union. She answered, "I think if you are interested in working for the Company you will be interested enough to join the Plant Union." The employees at St. Joseph at once unanimously agreed to join.

Rose Todd's reputation as a representative of the management spread beyond the walls of the plant. When she went to the First National Bank on April 1, 1937, and borrowed $1,000 upon the unsecured note of the Nelly Don Loyalty League, she went directly to the president of the bank who testified before the Board as follows (II 718W):

"Q. Mr. Swinney, how long you known Rose Todd prior to the time she made application for this loan? A. I would say about 10 or 12 years.

Q. Where did you meet her, Mr. Swinney? A. At my office.

Q. In what connection? A. She was a kind of 'all-around-man' for the Company.

Q. For the Donnelly Garment Company? A. Yes, sir.

Q. And she had come in there before on matters for the Company, had she? A. Oh, yes."

Many representatives of the Company other than Todd and the instructors and thread girls joined the plant union.

In addition to Todd, Hobart Atherton, who the examiner found to be a supervisory employee (X 3858), took a very active part in the Company's activities against the International prior to the formation of the Union, and a very active part in the formation of the Union and its operations thereafter. He, with Todd, called the meeting on March 18, 1937; he went with Todd to employ the attorneys; he was elected a member of the Group Chairmen at the organization meeting, and was very active in the meetings of the Plant Union from then on as is shown by the Plant Union minutes (IPI 821-947).

Dewey Atchison, Production Engineer, joined the union at the organization meeting, as did Heath Cowan, head of the Receiving Department, Marvin Price, in charge of maintenance of factory building and equipment, Ortense Root, head of the Sample Department, Martha Gray, head of the Outlet Store, Florence Strickland, head of the Pattern Department, Ted Scoles, in charge of the Cutting Department, Lena Tyhurst, in charge of the Inspection Department, Mary Bogart, in charge of the Dividing Department, Lulu Nichols, in charge of the Piece-work Price-fixing Department, and all of the other heads of departments, managers, supervisors, instructors and thread girls, except ten named by Rose Todd (X 3859, 3875-3878; I 135-136; X 3644-3652).

The examiner found (X 3875):

> "Under all the circumstances the undersigned concludes and finds, that the concept of an independent union originated with respondent's supervisory employees, and further, respondent, through the activities of its supervisory employees gave approval, lent assistance and encouragement to the DGWU."

And further (X 3878):

> "Inasmuch as the respondent through its supervisory employees' membership and participation in the activities of the D.G.W.U., continued its control and direction of that organization, the undersigned finds that respondent is responsible for their activities and that they were acting for and in behalf of the respondent."

The Company contributed financial support to the organization and maintenance of the plant union.

The Group Chairman met with Mrs. Reed on May 6, 1937, to discuss a contract. What happened is in part shown by the minutes of the Plant Union's Group Chairmen of that date (III 913). Rose Todd said to Mrs. Reed:

> "There is one thing we want to ask you to consider when we submit this plan to you—and that is we would like to have a closed shop."

Mrs. Reed said to Rose Todd:

> "I understand that is very essential to industrial peace."

(The closed shop was contracted for on May 27, 1937, and became effective June 5, 1937.)

> "Rose Todd: Another thing we want to submit for your consideration, is that we feel that the Donnelly Garment Workers' Union should (if it is satisfactory with you and with the Union) pay part of the General Chairman's salary, if the Company is willing to pay their part.
>
> Mrs. Reed: That is satisfactory with me.
>
> Rose Todd: Later it may be necessary for the Union to pay the General Chairman full time.

Mrs. Reed: I do not feel at the present time that you would need to give all of your time to the Union."

On May 27, 1937, the group chairmen and Mr. Tyler met with Mrs. Reed and her executives, and presented to Mrs. Reed a proposed contract (III 920). The contract, as presented, was accepted by Mrs. Reed with one material change (III 922). The minutes of the plant union's group chairman of May 27, 1937, show the following:

"A meeting of the Group Chairman with Mr. Tyler, May 27, 1937.

(After working agreement had been presented to Mrs. Reed and a few modifications made.)

Mr. Tyler: This form has been modified in three or four places. Miss Todd was here every minute of the time when these modifications were made. In my opinion it is a satisfactory form and I suggest to you and advise you to execute it."

Ms. Tyler speaking:

"Also we have added to this agreement that to become a member of this committee you must be employed here for at least one year. This is to eliminate the possibility of someone getting on this committee who is not a true representative of the employees, and who may be working here merely to act as a traitor to the Company."

The clause adopted was as follows (III 808):

"The employer recognizes the election of a committee of the Union to represent it; provided members of such committee shall have been continuously employed by the employer for the period of at least a year immediately preceding the election of such committee, and the employer agrees to further nego-

> tiate and deal with such committee in regard to the working conditions, wages and hours of labor of employees, and all other matters properly within the jurisdiction of such committee."

It will be recalled that at the organization meeting Mr. Tyler (III 824, 825) stated:

> "I do not think this action (the formation of the plant union) can or will be considered as any act of unfriendliness to your employer. I believe they recognize your right to take this step, and that it isn't an unfriendly act to them. In fact, it is much better for them, and for yourselves, for you to have your own union, your own representatives, rather than have a group here trying to represent outsiders from New York, and another group here representing some other outside union, etc."

The job was now complete. The plant union had been formed; the By-Laws prohibited any member from belonging to any other union; that union had been given a closed shop contract; and it was provided that no one could be on the bargaining committee who had not been in the employ of the Company for at least one year, so as to keep out anyone "who may be working here merely to act as a traitor to the Company."

The parties executed a supplementary agreement with reference to wages, hours and working conditions, on the 22nd day of June, 1937 (III 812-821), which provided, among other things, that:

> "'Methods now used by the employer determining piece-work rates, shall be continued.'"

The plant union and the Company did just that, even to the extent of making the Company's executive head of the piece-work price-fixing department, Lulu Nichols, and

her assistant, Josephine Spalitto, and Rose Todd, a committee of three to represent the Union in this, the most vital and important matter about which the Company and the union had to bargain (X 3881; I 114; III 923; II 417-418, 718f; III 1007, 2009; V 1374-1375; VII 2144-2148, 2158, 2234-2293, 2400; III 1109). At the meeting of the group chairman, as shown by their minutes (III 923), Rose Todd said:

> "I would like to have a committee named to set piece work prices. As you know we have never had any trouble with the Company about piece work prices, but I feel we should have a committee to handle this for us."

(Motion made that Rose Todd, Josephine Spalitto and Lulu Nichols form this committee. Motion seconded. Unanimous.)

Ella Mae Hyde testified at the N.I.R.A. hearing, May 6, 1935 (III 1108-1109), that Lulu Nichols was on the piece work price-fixing committee for the Company, and that she was an executive.

Elizabeth Reeves, merchandising head of the Company, testified at the 1939 hearing before the Board (II 417-419), as follows:

> "Q. For many, many years Mrs. Nichols has been also on the price fixing committee of the Donnelly Garment Company? A. That is right.
>
> Q. And still is? A. That is right.
>
> Q. And has Josephine Spalito assisted her at that work, too? A. Yes, sir.
>
> Q. At fixing prices? A. Yes, sir."

The examiner found, and the Board approved (X 3887), that:

> "The completeness of the respondent's domination becomes more clear, as shown by the personnel of the DGWU committee for the adjustment of piece work rates. Two of the three of this committee are persons employed by the respondent to set piece work rates in the first instance and when one of these two, Lulu Nichols, is the respondent's authority on the finality of the rate, the result is that the respondent sits on both sides of the bargaining table and the aggrieved operators are left without any means of independent collective bargaining with regard to piece work rates, ordinarily a matter jealously guarded for the promotion of the employees."

In August or September, 1937, the Company commenced checking off dues of the employees and turning the money over to the plant union (X 3880; I 224, 226-227, 233-234, 259, 262, 274a-274b, 379; VII 2112-2113, 2387-2388). The Company required each individual employee to sign a card prepared by the Company authorizing the Company to check off the employees' dues. The money was turned over to the plant union in a lump sum and no list of employees whose dues had been checked off was furnished by the Company to the plant union. How long an employee had to work during any one month before the employee's dues would be checked off was entirely within the discretion of the Company, and was a matter about which the Union did nothing.

The Company contributed financial support to the organization and maintenance of the plant union.

The attorney who advised with Rose Todd and Hobart Atherton, supervisors, about the formation of the plant

union, and who prepared the by-laws and helped negotiate the contract with the Company, was paid by the Nelly Don Loyalty League, a Company-dominated, financed and controlled organization, admittedly having in its membership everyone in the plant except Mrs. Reed and Baty.

The chairs used at the organization meeting were ordered and paid for by the Loyalty League (X 3884; III 963).

The examiner found, and the Board approved, that piece-work operators who served as group chairmen, or officers, were paid by the respondent for the time lost at work while attending to D.G.W.U. business, the time-workers being allowed to take time from work with no deductions from their pay (X 3884; IX 3427-3429, 3447-3449, 3446-3467, X 3603-3604, 3606-3609, 3618, I 127-128, 166).

Lola Skeens, for many years in the employ of the Company as an instructor, testified (IX 3427, 3429):

> "Q. Do you know Sally Ormsby? A. Yes, I do.
> Q. Did she work in your section in 1937? A. Yes.
> Q. Do you know whether she held any position in the Donnelly Garment Workers' Union? A. She was a representative for the operators.
>
> * * * * * *
>
> Q. Do you know of any occasions on which she went to Mr. Tyler's office, or attended to business of the Donnelly Garment Workers' Union during working hours? A. She did go, because she would come back and give me her time and ask me to make out her time ticket.
> Q. Did you make out her time tickets? A. Yes
> Q. And was she so paid? A. Yes.
> Q. And was that true every time she left work to go to see Mr. Tyler? A. During working hours, yes.

Q. Did the time tickets show what she was doing? A. Yes, they did for a while.

Q. Did you write it on? A. I wrote on it, 'For union meeting.'

Q. Did you do that on all occasions? A. I did at first, and then Miss Todd came to me and asked me not to put that on. And I asked her what I should write, she said just to put it under 'miscellaneous' and they would understand.

Q. And did you follow Miss Todd's directions? A. Yes, I did."

Neither the Company nor the plant union produced Miss Ormby to deny that she had been so paid, nor did they produce her time tickets for that period.

Bessie Weilert gave similar testimony (X 3603-3604, 3606-3609).

Etta Dorsey gave similar testimony (IX 3329-3330).

The plant union held its meetings on the second floor of the building, which up until the 7th day of May, 1937, was not a part of the building leased by the Company. The Company did lease that floor, and the entire building, on the 10th of May, 1937, and occupied it under a lease from then on through July 15, 1939. The plant union continued to use the second floor and later the first floor for its meetings without paying any rent (X 3882; I-130-131, II 380, 381, III 877, 939, 940, 943) until April, 1938 (X 3882; II 387cc-378dd).

At a meeting of the group chairmen, November 16, 1937, as shown by their minutes (III 937-939), the question of paying rent was taken up. Rose Todd said:

"I understand the Company leased this entire building sometime back and we should ask them about paying some rent for the use of the space for our meetings.

Marjory Green: I think $2.50 or $3.00 would be sufficient. We have to furnish the chairs ourselves in addition to that, which makes it rather expensive.

Rose Todd: We will write a letter to the Company regarding this."

At a meeting of the group chairmen on December 15, 1937 (III 940-943), Rose Todd reported:

"Another thing, we have corresponded with Mr. Green (vice-president of the Company, I 354b) and he advises that $3.00 per meeting will be satisfactory rent for us to pay for the space used for our meetings, to be paid at the end of our fiscal year."

At the meeting of the plant union on May 11, 1937, the meeting following the organization meeting (III 830-835) the minutes show the following:

(835) Question: "Can we maintain our standing as a union and meet on premises maintained by the Company?"

Answer (by Rose Todd): "So far we can."

An insight into the character of the testimony given by Lee Baty is found on this rental subject. He testified (II 511) as follows:

Q. When was it that you discussed with the officials of the Donnelly Garment Workers' Union about having their rent for the first floor? A. I think it was sometime in the month of May, 1937.

Q. Did you agree then it would be $3.00 a month rent? A. We did.

Q. Who did you make the agreement with? A. Rose Todd."

But the minutes of the group chairmen on November 16, 1937, above quoted, do not uphold Mr. Baty; nor do the minutes of the group chairmen of December 15. Those minutes show that it wasn't in May that the arrangement to pay rent was made, and it wasn't with Baty at all, but with Mr. Green, the vice-president, that the union made the arrangement.

The group chairmen had frequent meetings prior to May, 1938, and they were always held in the office of Mrs. Spilsbury (X 3882-3883; I 38, 151, 136, II 490, III 924, 928, VII 176, 2198, 2201, 2203-2207, IX 3233) and thereafter in the auditorium on the first floor (Company property) (X 3833; III 946). No rental was ever paid for the use of the Company property for holding group chairmen meetings.

The union maintained no office except a Company desk used by Rose Todd on the ninth floor of the Company's plant, to which place she requested that any member of the plant union come to consult with her about any matter of plant union interest (X 3884-3885; I 133, III 830, 831, 833, 835, 869-870). The only furniture, except the desk used by the plant union, was a filing cabinet belonging to the Company (X 3884; I 35-36).

Rose Todd used the Company's intercommunicating telephone system to call meetings through the aid of instructors of each section; used the Company's typewriter and mimeograph machine, and any other facilities and property of the Company which she found necessary to carry on the affairs of the union (X 3883; I 128a-129, II 387ge, 704g, V 1364e, 1374d, VIII 2897, IX 3152-3153, 3276, 3397-3399, 3434, X 3558, VIII 2621-2622, IX 3342, X 3672).

The examiner found, and the Board approved (X 3888):

> "On all the evidence the undersigned finds the respondent dominated and interfered with the formation and administration of the D.G.W.U. and contributed support thereto, and that the respondent thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

Company and plant union evidence as to why the employees joined the plant union.

The Company and the plant union attempted throughout the hearing to show that the employees joined the plant union of their own free will and accord, and because they were fearful of physical violence, which the Company and the plant union insisted the International had threatened. They produced eleven witnesses in 1942 who so testified (VIII 2564-3000, IX 3002-3249).

The Board produced witnesses who testified that they had joined the union to hold their jobs with the Company, and not because of any fear of physical violence from the International, and not of their own free will and accord.

Lola Skeens testified (IX 3455):

> "Q. Were the employees talking about means to protect themselves against any attacks that would be made by the ILGWU? A. Well, I didn't hear that."

And again (IX 3456):

> "Q. Well, did you personally have any fear about being able to get in and out of the building without getting hurt? A. Oh, no, I never thought that."

Geneva Copenhaver testified (X 3532-3533) as follows:

"Q. You stated already that the violence and the newspaper articles and talk of violence had nothing whatever to do with your joining the Donnelly Garment Workers' Union, did you not? A. Yes.

Q. Do you know any person who did join on that account? A. Because of the—

Q. (Interrupting) Violence and the newspaper articles and everything of that sort? A. No, I don't.

* * * * * * *

Q. (Continuing) Because of the violence and newspaper articles shown you, or any fear or threats of violence? A. You mean, is that why I joined?

Q. No. A. Why anyone else joined?

Q. Do you know of anyone else who joined on that account? A. Because they were afraid of that violence?

Q. Yes, do you know of anybody, any single human being? A. No, I don't know of anybody that joined because of that."

The same witness testified (X 3497):

"Q. Why did you sign the card? (The union membership card.) A. Well, I felt like I'd better, if I wanted my job. That was the impression I got from it. I needed my job and I needed it badly, and I got the impression that if I didn't, I wouldn't have a job very long."

She further testified (X 3498):

"Q. Did you join the Donnelly Garment Workers' Union of your own free will? A. Well, I joined it of my own free will to the extent of this: I was never threatened or told if I didn't join the Union I would be fired, or anything of the kind, by the Company or anybody who had any authority down there. But it was just clear in my own mind if I didn't belong to

the Union I wouldn't have a job there very long, and I still feel that way about it."

(X 3504):

"Q. Was there a general discussion among the employees at the Donnelly plant of the violence going on in those strikes? A. Oh, you heard some girls talking about it.

Q. But there wasn't much talk? A. Oh, it was discussed quite a bit, naturally.

Q. Were you of the opinion that there was going to be any violence at the Donnelly plant? A. I never had the slightest bit of fear in going in and out of the Donnelly plant—going back and forth to work, of being bothered by the union in any way. I was never approached—I drove my car back and forth every day and parked it there and I never saw anything in front of the Donnelly plant that might bother us."

Mrs. Copenhaver was cross-examined by counsel for the Company and plant union about an affidavit which she had signed to the effect that she had joined the plant union of her own free will and accord. She testified (X 3519):

"Q. Did you think you understood what that statement was that you were signing? A. I thought I did.

Q. As a matter of fact, when you sign your name, you think you understand what you are signing your name to, don't you? A. I wouldn't say I thoroughly understood everything I signed down at Donnelly's.

Q. Don't you think at the time you sign your name to something you understand what you are signing? A. I think I should. I know now that I should. But at that time we signed so many things down there, you would sign them hurriedly and you didn't have time to stop and read those things thoroughly and

absorb them like you should. * * * I signed my name and didn't think much about it."

Again she testified with reference to signing said affidavit (X 3525):

"A. I don't know as it was my choice. I was told that it was down there to be signed and I knew I was expected to sign it."

She testified further (X 3536-3537):

"Q. Now, do you have any recollection at all as to where you signed this Board's 1-RRRR? (III 764.) A. You mean the one where we swore to it?

Q. No, I mean the other one. A. I don't remember a whole lot about that one.

Q. Was it somewhere in the plant? * * * (3537) A. It was on the premises. I never signed one that was away from the building. Everyone I ever signed was right there in the building, some place in the building.

Q. Were you ever shown any document down there to sign that you didn't sign? A. No.

Q. You signed them all? A. Every one that I was presented with."

Bessie Weilert (X 3594-3597), on being handed an affidavit (Intervener's No. 20, VI 1713) and asked if she signed it, by counsel for the Company, stated that she did.

"Q. I hand you the affidavit and ask you to state what was not true. A. Well, I didn't consider that 'wish' and 'choice' correct. It wasn't our wish and our choice, it was just a matter of duty. I felt it was our duty to belong to that union if that was what they wanted us to do. I can't really say it was my wish and choice, but that it was necessary" (X 3596).

"Q. What was the next item that was untrue at the

time you swore to it? * * * A. Where it says: 'We understand that there is in some quarters a disposition to question the fact that membership in our own union is our own voluntary choice, therefore, for the purpose of establishing that fact to the satisfaction of the Labor Board, the public, the International Ladies' Garment Workers' Union, and any and all others who may be interested'."

May Stevens testified (X 3676):

"Q. Mrs. Stevens, I want to go to the subject of the reason for the formation of the Donnelly Garment Workers' Union. Did fear have anything to do with that? A. Not to me, it didn't."

And again (X 3683):

"Q. You say, do you, that fear, personal fear of personal violence to you, played no part at all in your choice to belong to the Donnelly Garment Workers Union, and help organize it? A. Absolutely not."

And again at (X 3691) on cross-examination by Mr. Tyler:

"Q. When you stated this morning that you went along with the Donnelly Garment Workers' Union, at the beginning because you thought it would mean your job, did you mean that you believed that at that time you would be discharged if you had not joined? A. Yes, that is what I believed.

Q. What did you base that belief on? A. The Fern Sigler incident.

Q. Did you believe that the overwhelming majority of the employees wanted this Union and would get a closed shop contract, and for that reason you would have to join or lose your job?

A. No, not in that sense of the word, about the overwhelming majority. It was because that we went in that meeting unprepared, and they just as much as forced us to join it.

Q. What do you mean by 'just as much as forced you to join it'? A. We were handed cards and they told them to count them and see that every card was accounted for and handed back.

Q. And the fact that cards were accounted for, in your mind, means that you were forced to join? A. Yes.

Q. Weren't you told in that meeting that you were to do as you pleased, and nobody was to sign a card that didn't want to, or if anybody wanted to think it over, he was to keep it? A. Perhaps so, but we knew differently.

Mrs. Stevens was shown Interviewer's Exhibit No. 20 (VI 1741), which she had signed and which stated that it was the free wish and choice of those signing the Exhibit to belong to the Donnelly Garment Workers' Union. She testified with reference thereto as follows (X 3692):

"Q. Was that statement true or false when you signed it? A. It was false, because it wasn't my free wish to join it or what I chose to do of my free will."

At (X 3690) Mrs. May Stevens testified with reference to the Board's Exhibit 1-RRRR (III 764), which she had signed, by Mr. Tyler:

"Q. I will ask you to note the last paragraph which says: 'The undersigned state that they are members of the Donnelly Garment Workers' Union and joined said union and have at all times since remained members thereof, solely of their own free will, choice and preference, that they have not been

influenced by any threats, coercion or pressure of their employer or any representative of said employer, and that they have no knowledge of any incidents in which the employer or any representative of the employer has exerted pressure, intimidation, coercion or any other influence upon the undersigned or any other employees to join the Donnelly Garment Workers' Union, or to stay out of any other labor union.' Was that true or false at the time you made it? A. It was false.

Q. At the time you made it it was false, is that your answer? A. As to my state of mind about it."

The examiner found (X 3885):

"From the foregoing facts, conclusions, and findings, it is clear that, notwithstanding the contenton of the respondent and the DGWU that the DGWU's formation was the result of the employees' own choice of a collective bargaining representative, the respondent has not permitted the employees to freely exercise that right of self-organization free from employer influence and domination."

The Board found (A 618-619):

"In remanding the case to the Board for further hearing, the Circuit Court directed that the respondent and the DGWU be permitted to adduce the previously proffered testimony of respondent's employees to show, in substance, that they formed and joined the DGWU of their own free will and that they were not influenced, interfered with, or coerced by the respondent in choosing that organization as their bargaining representative * * * We have carefully considered all such evidence adduced by the respondent and the DGWU. We find, however, that the testimony in question does not overcome more positive evidence in the record that the respondent permitted acts of interference and assistance in the

formation and administraton of the DGWU, which subjected that organization to the respondent's domination and which removed from the employees' selection of the DGWU the complete freedom of choice which the Act contemplates."

SUMMARY, WITH PAGE CITATION, OF ARGUMENT.

The argument is in seven divisions, under numerical points.

Point One (Page 71).

There is substantial evidence to support the findings and order of the Board. There are three summaries of such evidence: (1) statements of evidence in this brief; (2) summary of evidence by counsel in case No. 786; and, (3) summaries by Judge Sanborn (151 Fed. (2d) 855 to 869) and by Judge Woodrough (151 Fed. (2d) 879). It being established that there is substantial evidence to support the findings, the court may not weigh, but must wholly disregard conflicting evidence no matter how convincing to the court such evidence otherwise might be. Into that field the court may not go, all the way in, or at all. Cases and authorities are cited.

Point Two (Page 75).

Even if rejection of the given evidence by the examiner were a judicial error, it is not a denial of due process. The sole ground upon which the Court of Appeals set aside the Board's order was denial of due process. We take issue, there was no denial of due process. Fundamental principles of due process, as applied to judicial proceedings, and what constitutes a denial thereof, together with supporting authorities, are stated. Judicial error is not denial of due process. Due process does not guarantee against judicial error.

The court, in determining whether an order by an administrative board constitutes a denial of due process, is guided and restricted by the same canons of constitutional law that are applicable to a determination of the

constitutionality of a direct legislative act. The task of holding that either a statute or an order by an administrative board is unconstitutional because a denial of due process is a delicate one and every presumption and intendment is to be indulged in favor of validity. Before rejection of evidence can be a denial of due process, its exclusion must transcend mere judicial error. The rejected evidence must be so direct and vital, so essential to the party's case, that without it there is no real trial. The ruling must not only be wrong, but so manifestly wrong that it is arbitrary.

The rejected evidence in this case is not of that character.

Point Three (Page 84).

So far from the rejection of the evidence in question being a denial of due process, such rejection would not have been reversible error in an ordinary jury trial. The rejected evidence is classified and it is argued that none thereof was admissible in any event because the receipt of such proferred evidence would lead to the trial of collateral issues, detract the mind of the trier of fact from the real issues and unduly prolong the trial. There is a well-known exception to the general rule that all relevant evidence must be received, which is, that the same may and should be rejected by a trial judge when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case, and protract the trial beyond reasonable limits. This rule is called the Doctrine of Collateral Inconvenience, by Dr. Greenleaf.

Point Four (Page 90).

The examiner did receive, and both the examiner and the Board did consider and weigh the employees' testimony, as ordered by the Court of Appeals.

By the ruling of Judges Sanborn and Riddick the order was set aside because the majority of the court held that while such evidence was received, the Board did not give the weight thereto which the court believed it was entitled to have.

Quotations from the record conclusively show not only that such evidence was received, but that it was considered and weighed.

Point Five (Page 94).

The Court of Appeals, in direct violation of the provisions of the Act, did itself weigh conflicting evidence. The Court of Appeals set its own opinion of the value and weight of given evidence against the opinion of the Board, and because of its opinion of the value of such testimony, the court did set aside the order of the Board.

Point Six (Page 95).

A careful reading of the opinions and consideration of the entire record demonstrate that the Court of Appeals has treated its jurisdiction to review findings and orders of administrative boards as coextensive with, similar and analogous to, its judicial authority in legal proceedings as upon appeal from court to court. The jurisdiction of a court to review and otherwise deal with judicial proceedings, either in the trial court or on appeal, is contrasted with the statutory and constitutional jurisdiction of the court in review of an administrative order. The

court in this case went clearly beyond either statutory or constitutional jurisdiction of the court to review administrative orders and did exercise jurisdiction which it did not have in that field, but which it had only in the field of appeal from court to court. The principles of public administrative law here involved are set forth.

Point Seven (Page 98).

Failure of the Board to designate a trial examiner for the second hearing, other than the one who conducted the first hearing, did not justify the court of appeals in setting aside the order.

ARGUMENT

Point One.

There is substantial evidence in the Record to support the findings and order of the Board.

The evidence supporting the findings is summarized with appropriate references to the record in the division of this brief entitled Statement of Evidence Supporting the Board's Finding. Such evidence is likewise summarized in the brief of petitioner in No. 786. A part, but not all, of such supporting evidence is summarized in the opinion of Judge Sanborn (151 Fed. (2d) 855 to 869), and likewise in the opinion of Judge Woodrough, and particularly at page 879 wherein he states: "My study of the record herein has satisfied me that the findings of the Board herein are sustained by substantial evidence." While in our judgment it is finally for this Court to determine *de novo* from the record whether there is such substantial evidence, yet the recital by Judge Sanborn, fortified and sustained by Judge Woodrough, is relevant and persuasive.

In scrutinizing the record for evidence supporting the finding, we are not concerned with, but disregard, conflicting evidence; "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." (USCA, Title 29, Section 160 (e) and cases hereinafter cited.)

These summaries of favorable evidence (brief of petitioner in 786, this brief and the recitals of such evidence by Judges Sanborn and Woodrough) verified by the record, present a clear picture of unfair labor practice in violation of Sections 7, 8 (2) and other provisions of the

Act. Such evidence shows that the Company dominated and interfered with the formation and administration of the plant union and contributed support thereto, thus interfering with and restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act; that the closed shop agreement with the plant union was an integral part of the Company's plan to discourage and prevent membership of its employees in the International; that the Company dominated and interfered with the administration of the plant union and contributed financial and other support thereto; that the Company discouraged membership in the International Union by laying off employees and discriminating in regard to their hire and tenure of employment; that the Company dominated, controlled and used the plant union to interfere with, restrain and coerce its employees in the exercise of their rights guaranteed in Section 7 of the Act; that the Company, because of hostility to the International, influenced and coerced its employees into forming a plant union, depriving the employees of their freedom of action and choice and making them, in effect, servants dominated by their employer.

Manifestly such evidence, together with all reasonable inferences that the Board was entitled to draw therefrom, supports the finding and order of the Board of the existence of unfair labor practice.

The court may not weigh the evidence.

Once it is established that there is evidence supporting the finding, the court cannot weigh, but must wholly disregard, conflicting evidence no matter how convincing it may seem. Into that field the court may not go, all the way in, or at all. Thus the law is written, USCA, Title 29, Section 160 (e) (f):

"Our most limited power of review has been made crystal clear. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208, 209, 226, 60 S. Ct. 493, 84 L. Ed. 704; *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 342, 343, 60 S. Ct. 918, 84 L. Ed. 1226." *National Labor Relations Board* v. *Milan Shirt Mfg. Co.*, 125 Fed. (2d) 376.

"As we stated in *National Labor Relations Board* v. *Waterman Steamship Corp.*, *supra*, 309 U. S. at pages 208, 209, 60 S. Ct. at pages 495, 496, 84 L. Ed. 704; '* * *' Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act.' Congress entrusted the Board, not the courts, with the power to draw inferences from the facts. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271, 58 S. Ct. 571, 576, 82 L. Ed. 831, 115 A. L. R. 307; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461, 60 S. Ct. 307, 311, 84 L. Ed. 396. The Board, like other expert agencies dealing with specialized fields (see *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146, 59 S. Ct. 754, 764, 83 L. Ed. 1147; *Swayne & Hoyt Ltd.* v. *United States*, 300 U. S. 297, 304, 57 S. Ct. 478, 481, 81 L. Ed. 659) has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." *National Labor Relations Board* v. *Link-Belt Co.*, 61 S. Ct. [illegible], c. 365, 311 U. S. 584.

Precedents can be multiplied; none modifies nor restricts the foregoing. A few illustrative applications follow:

An *inference* (contrasted with direct evidence) of fact by the Board, "may not be set aside upon judicial review because the courts would have drawn a different inference." (*NLRB* v. *Southern Company*, 319 U. S. 50, 63 S. Ct. l. c. 910.) Inferences drawn by the Board "from evidentiary facts are fact questions to be determined by the Board and a finding of inferential facts made by the Board will not be disturbed by the court, if warranted from the evidence, even though it permits of conflicting inferences." *Swift* v. *NLRB*, 106 Fed. (2d) l. c. 93 (10 CCA). If the evidence picture permits conflicting inferences the order may not be set aside, "inferences to be drawn are for the Board and not the courts." *Montgomery Ward* v. *NLRB*, 107 Fed. (2d) l. c. 560 (7 CCA). See also *NLRB* v. *Pennsylvania Lines*, 303 U. S. 261, 271, 58 S. Ct. 571; *Wilson & Company* v. *NLRB*, 124 Fed. (2d) 845, l. c. 847 (7 CCA).

A Board finding based upon hearsay testimony may not for that reason be set aside where it is the kind of evidence "on which reasonable men are accustomed to rely in serious affairs," for "it is only convincing, not lawyers' evidence, which is required, evidence such as a reasonable mind might accept, though other like minds might not do so." *NLRB* v. *Remington-Rand*, 130 Fed. (2d) l. c. 930. See also *International Lodge* v. *NLRB*, 110 Fed. (2d) 29, affirmed 311 U. S. 72, 61 S. Ct. 83; *Consolidated* v. *NLRB*, 305 U. S. 197, 59 S. Ct. 206, l. c. 217.

The Board may reasonably choose the criteria determinative of an issue of fact and reject evidence which has no materiality in view of the criteria adopted; such rejection is not a denial of due process. 143 Fed. (2d) 488

(8 CCA). See also *FPC* v. *Natural Gas Company*, 315 U. S. 575, 586, 62 S. Ct. 736, 743.

It is our submission under this Point One that, viewed in light of the foregoing principles of law and the application thereof in specific illustrations, there was sufficient credible evidence to support the finding and order of the Board. In fact, there was more than sufficient, there was an abundance of such evidence.

The Board acted within its recognized and approved authority in ordering the Company to reimburse all of its employees for all dues and assessments which it had deducted from their wages on behalf of the plant union. (Vol. A. 622.)

The existence in the Board of such authority has been precisely and clearly approved by the Supreme Court in the case of *Virginia Power Company* v. *NLRB*, 319 U. S. 533, 539, 545, 63 S. Ct. 1214.

POINT TWO.

Even if rejection of the given evidence by the examiner were judicial error, it is not denial of due process.

The sole ground on which the Court of Appeals set aside the Board's order was want of due process. The decree of the Court of Appeals is as follows:

> "On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the prayer of the National Labor Relations Board for a decree of this Court enforcing the order under review is hereby denied for want of due process in the proceedings upon which the order is based, and said order is hereby set aside." (Court of Appeals decree, October 29, 1945.) (Vol. XIII, R. 4376.)

We take issue. There was no denial of due process. This involves consideration of the fundamental principles of due process and what constitutes a denial thereof.

Due process of law as applied to judicial proceedings.

The term "due process of law," or its equivalent, is not defined in the Constitution. Courts have been reluctant to define the term in its broadest application, being rather disposed to ascertain its intent and application by gradual process of judicial inclusion and exclusion, 12 C. J. 1188, and a multitude of decisions of which *Murray v. Hoboken Land Company*, 18 Howard 272, 277, is typical. This, however, is true only in its broadest application of the term. It is not true as applied to judicial proceedings. In that field specific definitions and applications have been by the courts repeatedly made. Whatever difficulty the courts have experienced in giving the term a specific definition as applied to every permissible exertion of government power, the courts have declared, and it is the settled law, that there can be no doubt of the meaning of due process of law when applied to judicial proceedings.

When the term is applied to judicial proceedings, it means a proceeding which hears before it condemns; which proceeds upon notice and upon inquiry and wherein judgment is rendered only after trial. (16 C. J. S. 1143; 12 C. J. 1192); *Pennoyer v. Neff*, 95 U. S. 714, 733; *Southern Bell Telephone Co. v. Louisiana Comm.*, 195 La. 729, 17 So. 548.

> Whatever difficulty may be experienced in giving to the term "due process of law" a definition which will embrace every permissible exertion of power affecting private rights, and excludes such as is forbidden; it has been said that there can be no doubt of its mean-

ing when applied to judicial proceedings, and as so applied due process of law has been variously held to mean a law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial. 16 C. J. S. 1143; *Parsons* v. *Russell*, 11 Mich. 113, 124, 83 Am. D. 728; *Huber* v. *Reily*, 53 Penn. 112.

The definition in Webster's argument in the Dartmouth College case, 4 Wheaton 518, 581, is classical: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

> "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta. Lord Coke, in his commentary on these words (2 Inst. 50), says they mean due process of law. The constitutions which have been adopted in the several states before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words 'but by the judgment of his peers or the law of the land.'" *Murray* v. *Hoboken*, 18 Howard (59 U. S.) 272, l. c. 276.

The Murray case, like many preceding and subsequent decisions, holds that the term "law of the land" means precisely what Webster defined it to mean; the very substance of which is, a law which hears before it condemns, which proceeds upon inquiry after notice, and renders judgment after trial.

Any judicial proceeding that measures up to the requirements of the Webster definition, affords the parties due process, no matter what procedural errors or erroneous reasoning leading to injustice in the given case may be asserted. Such alleged errors may be presented *only* on new trial or on appeal from court to court. *They*

cannot successfully be asserted as a denial of due process.

The definition of due process is exact and clearly expressed, but likewise are its limitations. Webster's definition was not new. He clearly saw and clearly defined three (and only three) prerequisites to due process, which were, (1) a hearing before condemnation, which of course involves notice, (2) judicial inquiry, and (3) judgment only after trial. Precisely the same thing had been said as far back as Coke's Institutes, which pronounced essential elements of law of the land as "*actor, reus, judex*" —some form of complaint by *actor* (plaintiff); opportunity to answer on hearing by *reus* (defendant), and a trial before a judge (*judex*), according to the essentials of some judicial proceeding. *Murray* v. *Hoboken*, 18 Howard 272, l. c. 280.

Due process does not guarantee against judicial error.

Where the parties have been heard in regular course of judicial proceeding, affording the essentials of due process as clearly defined, no error of the court in procedure or in decision is a denial of due process.

Attempts to review decisions on the ground of denial of due process by unsuccessful litigants, have been characterized as the last resort in desperate cases.

> "So numerous, so varied, and in many cases so trifling have been the questions raised as to the protection afforded by the guaranty of due process of law, that objections founded on it have been judicially characterized as 'those last resorts of desperate cases.'" 16 C. J. S. 1150; see also *Commonwealth* v. *Philadelphia Coal Co.*, 145 Pa. 283, 286, 23 Atl. 809, 12 C. J. 1195, Note 85; *Mabee* v. *McDonald*, (Tex.) 175 S. W. 676.

"The due process clause has been much abused and stretched to limits never designed by the constitution makers." *Miami County* v. *Dayton*, 92 Ohio State 215, 115, 110 N. E. 276.

"There is here abundant evidence that there exists some strange misconception of the scope of this provision (the due process provision) as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decisions of this court the abstract opinions of every unsuccessful litigant in a state court, of the justice of the decision against him, and of the merits of the litigation on which such a decision may be founded." *Davidson* v. *New Orleans*, 96 U. S. 97, l. c. 104.

Judicial error is not denial of due process.

Where taxing boards of two states were proceeding to tax the same property, complainant filed a bill in the nature of interpleader. Against the claim of due process, the court said:

"In reaching the conclusion they (the respective taxing boards) did on the evidence, one or the other may have erred in judgment, but such error would not be a lack of due process or in violation of the equal protection clause. It has been settled that that amendment does not assure immunity from judicial error or uniformity of judicial decisions. *Milwaukee Electric Ry. & Light Co.* v. *Wisconsin*, 252 U. S. 100, 106, 40 S. Ct. 306, 309, 64 L. Ed. 476, 10 A. L. R. 892; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91; *Tracy* v. *Ginzberg*, 205 U. S. 170, 27 S. Ct. 461, 51 L. Ed. 755." *Riley* v. *Worcester County Trust Co.*, 89 Fed. (2d) l. c. 66.

"But, however that may be, the Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions (*Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569, 18 Sup. Ct. 445, 42 L. Ed. 853), any more than in guaranteeing due process it assures immunity from judicial error (*Central Land Co.* v. *Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91; *Tracy* v. *Ginzberg*, 205 U. S. 170, 27 Sup. Ct. 461, 51 L. Ed. 755)." *Milwaukee Electric Ry. & Light Co.* v. *State of Wisconsin*, 40 Sup. Ct. l. c. 309, 252 U. S. 100.

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States. *Walker* v. *Sauvinet*, 92 U. S. 90; *Head* v. *Amoskeag Co.*, 113 U. S. 9, 26, 5 Sup. Ct. 411; *Morley* v. *Railway Co.*, 146 U. S. 162, 171, 13 Sup. Ct. 54; *Bergemann* v. *Backer*, 157 U. S. 655, 15 Sup. Ct. 727." *Central Land Co. of West Virginia* v. *Laidley*, 159 U. S. 103, 16 Sup. Ct. l. c. 83.

"The plaintiff also insists that by the judgment of the supreme judicial court of Massachusetts he has been deprived of his property without the due process of law guaranteed by the 14th Amendment of the Constitution of the United States. This proposition is without merit. Within the meaning of that amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. The court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due

process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court involving merely the ownership of property could be brought here for review—a result not to be thought of." *Tracy* v. *Ginzberg*, 159 U. S. 103, 27 Sup. Ct. 1, c. 463.

The law could not be otherwise. A contention that a given trial is not a fair trial because it denies due process is necessarily an attempt to raise a constitutional question. If procedural error in the rejection of competent evidence is a denial of due process, then every case wherein there was rejection of such evidence would ultimately be for decision by the Supreme Court. If a Court of Appeals is to reverse the findings and order of the Board by reason of procedural errors in the receipt of evidence merely by stating that such rejection is a denial of due process of law, then all distinction, at least as far as the receipt of evidence is concerned, between the jurisdiction of the Court of Appeals under the Act on the one hand, and jurisdiction of such in legal proceedings in an appeal from court to court in a proceeding at law on the other, is destroyed. Such ruling is necessarily in conflict with *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 60 S. Ct. 918, and particularly in conflict with *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 308 U. S. 134, 60 S. Ct. 437, and *Fly* v. *Heitmeyer*, 309 U. S. 146, 60 S. Ct. 443.

Again for the Court of Appeals so to do is for the court to exercise jurisdiction far beyond that fixed by the Act of Congress, and far beyond any inherent jurisdiction bottomed upon the due process clause. This is so because rejection of evidence, at least of the character here involved, is at most judicial error and not denial of due process (cases *supra*).

The court in determining whether an order by an administrative board constitutes a denial of due process, is guided and restricted by the same canons of constitutional law applicable to determination of the constitutionality of a direct legislative Act.

The order of an administrative board, created by valid law, is inherently legislative and the validity of the order as to its constitutionality is to be tested and tried, precisely the same as if it were a specific legislative act. For instance, the legislature has power to regulate rates of common carriers and it may do so by as direct a statute as one providing that passenger rates shall be 3c a mile. Such statute is subject to the test of constitutionality against the claim that it is confiscatory and denial of due process.

For reasons well understood and learnedly discussed in the Pottsville case (308 U. S. 134), direct legislative regulatory acts become increasingly impractical, if not impossible. Hence legislative boards were born. These acts have successfully withstood persistent and skillful attack upon their constitutionality. Such laws have been sustained upon the theory that the act of the board is in itself, under a valid law, the act of the legislature. Instead of enacting that passenger rates shall be 3c per mile, the legislature provides that passenger rates shall be reasonable, in accordance with certain fundamental

principles and standards contained in the legislative act. Then the administrative board, acting in strict compliance with the standards fixed by the legislature, makes an order to fit the facts within a given case. When such board, in proper proceedings and hearing, makes an order that within a given territory passenger rates shall be 3c a mile, the situation is precisely as if the legislature itself had directed such rate. (See authorities hereinafter cited.)

Such administrative order is subject to the same constitutional test under the same canons guiding and restricting the courts in determining the constitutionality of the direct legislative act providing the passenger rate. Some of these canons here controlling are as follows:

While undoubtedly a court has judicial authority, in a given case, to declare a legislative act or administrative order unconstitutional and hence void, yet the task is "a delicate one and only to be entered upon with reluctance and hesitation." Every presumption and intendment is to be indulged in favor of validity. The burden is upon him who attacks the law or order. The invalidity must be clear and certain. Unless the act is clearly unconstitutional, it will be held valid.

> "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Union Pacific Railroad Co.* v. *United States*, 99 U. S. 700 (Sinking-Fund Cases).

1 Cooley's Constitutional Limitations, 8th edition, page 334; *Champion* v. *Anes*, 188 U. S. 321, 47 L. Ed. 492, 23 S. Ct. 34; *Jackson* v. *Bowden*, 67 Fla. 184, 64 So. 769, L. R. A. 1916D, 931. Any reasonable doubt as to the validity of the act is to be resolved in favor of its validity. *Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. Ed. 606. It is not sufficient that there be judicial doubt of validity. 1 Cooley's Constitutional Limitations, 8th edition, page 371; Wellington Petitioners, 16 Pick. 86, opinion by Shaw, Ch. J.; *Heisler* v. *Thomas*, 260 U. S. 245, 43 S. Ct. 83.

Under the principles variously exemplified in the foregoing authorities, before rejection of evidence can be denial of due process its exclusion must transcend mere judicial error. The rejected evidence must be so direct and vital, so essential to the party's case that without it there was no real trial. The ruling must not only be wrong, but so manifestly wrong that it is arbitrary. If the question of admission is at all debatable, its rejection cannot be denial of due process.

We submit that the rejected evidence in this case is not of that character.

Point Three.

So far from the rejection of the evidence being a denial of due process, such rejection would not have been reversible error in an ordinary jury trial.

In the first place, since all rulings rejecting evidence in the first hearing were assigned as error in the first case before the Court of Appeals, the examiner was warranted, in the second hearing, in assuming: (a) that his rulings with respect to the rejection of evidence, except where condemned, or at least mentioned in the court's opinion, were not erroneous and should be by him

followed; (b) that certainly his rejection, in the first hearing, of evidence of alleged illegal conduct of the International (which rejection was expressly approved by the court) (123 Fed. (2d) l. c. 225 (15)) was to be adhered to; (c) that he was not required to hear any new or additional evidence not within the scope of the remand.

These considerations alone dispose of nearly all complaint concerning rejection of evidence.

Moreover, the rejection of the evidence in question did not constitute reversible error.

Contracts between the International and other employers said to contain terms less favorable to the employees than the contract between the company and the plant union.

Such testimony was non-receivable because it would lead to endless collateral issues, a practice condemned by all trial courts. Who is to say one long complicated contract is more favorable to one party than another contract of like character between other parties? If one side introduces certain terms claimed to be more favorable, the other would introduce other terms and conditions *dehors* the contract said to counterbalance. The court would be deserting and laying aside the main issue to try endless collateral matters.

Aside from this, the only conceivable probative value of such evidence would be that it could be argued therefrom that the company employees formed the plant union because they believed it could obtain a more favorable contract than could the International. But, even here, the existence of such contracts could not bear upon the motive of the employee in joining the plant union unless the employee knew thereof, and then it would not be what was in the International contracts, but what the employee believed was in them. That is precisely the ruling of the

trial examiner. He excluded the terms of the collateral contracts, but admitted evidence from the employees as to what they believed were in such contracts and whether they joined the plant union because of what they so believed. Such ruling of the examiner's runs through pages of the record. We refer to Volume VII, 2514 and following, and Volume VIII, 2521, and following. For instance, note the following:

> "Trial Examiner Batten: I think it is important also to know what information they (the employees) had. I say 'what information they had,' not what information was available in somebody's office, Mr. Tyler. What information did these people have upon which they acted?" Vol. VII, 2514.
>
> "* * * we should take the testimony of these employees as to what they thought, what motivated them in doing the things they did. I agree with you on that. * * * In other words, it does seem to me that that is the primary purpose for which the court sent it back, to take the testimony of these people, what they thought, why they did these things." Vol. VII, 2518.

The trial examiner did receive testimony of the employees as to what they understood and had heard with respect to such contracts and other activities of the International and what effect such information had upon their joining the company union. Volume VII, 2593, 2594, 2929, 2931; Volume IX, 3080.

Testimony with respect to alleged illegal conduct, fraud and violence on the part of the International.

This evidence was excluded at the first hearing and its exclusion was expressly approved by the Court of Appeals in the first case, 123 Fed. (2d) l. c. 215, 225

(15)). Such testimony *was* non-receivable because it necessarily led to the trial of collateral issues. Moreover, in the second hearing the examiner did admit testimony on this subject for the only purpose for which it could possibly be relevant, and that was a bearing upon the motive of the employees in joining the plant union. Here again actual violence, fraud and other misconduct was not admissible per se, but what the employees had experienced, seen or heard and believed was admitted, regardless of whether such information was true or false. (VII, 2566-2568, 2624-2626-2711-2713, 2768-2771, 2788, 2848-2851, 2915-2917, 3003-3006, 3046-3049, 3078-3081, 3120-3121, 3169-3171, 4101-4102, 5125-4169, 4173-4175.)

Evidence that the International, under other contracts with other employers, received as eligible members employees allegedly having duties similar to those employees said to be supervisory employees at the Donnelly plant.

There was testimony that certain employees of the Company were supervisory employees, so that their statements and conduct would be binding upon the Company. The Company claimed these were not supervisory employees, and for the purpose of showing that they were not, the Company offered to prove that similar employees in other plants under contracts with the International, were admitted to membership, when they could not have been admitted if they were supervisory employees. Manifestly this was remote and collateral, leading, if it was received, to interminable comparison and inquiry concerning various kinds of employees in other plants; whether the conditions were similar in the various plants, or whether and wherein they differed, and so forth and so on. The rulings of the examiner are found in Volume

VII, 2508-2510; Volume VIII, 2559-2564-2788-2789; Volume IX, 3527; Volume X, 3787-3794.

In addition to this evidence leading to the trial of collateral issues, such evidence was inadmissible because what the International did with respect to other employers and employees could not possibly have material weight with the Board in determining the primary issue of the presence or absence of unfair labor practice by this Company. Respondents treat this case as if it were a suit at law between the International and the Company, wherein the acts and conduct and declarations of the International would be permissible because admissions against interest.

The case of *NLRB* v. *Indiana & Michigan Electric Company*, 318 U. S. 9, 63 S. Ct. 394, is not in point. The question in that case was the propriety of an order of remand to take additional evidence. It in nowise involved the power of the court to set aside the order of the Board, either statutory or because of denial of due process. The facts in the two cases are so divergent that neither case could stand as a precedent in the other.

In the Indiana case the excluded evidence which the court directed should be admitted, disclosed dynamiting and other violence, threats and intimidations resulting in witnesses refusing to testify or committing perjury, and conduct calculated and intended to influence witnesses, the examiner and the Board. Nothing of that sort is disclosed in this record. The controlling consideration was the effect upon the proceeding itself. The case did not hold that evidence of misconduct in labor matters of a union, even where a party to the proceeding, was admissible. It held exactly to the contrary. The evidence was admissible only upon the narrow ground that it bore

upon the discretion of the Board, not in the trial, but in issuing a complaint.

The marked distinction between the Indiana case and this case and the total absence in this case of the fundamental elements in the Indiana case, are strikingly shown by the findings of Judge Nordbye in *Donnelly Garment Co.* v. *International Union*, 55 Fed. Supp. 572, l. c. 594. That Donnelly case was a suit for injunction by the Company against officers of the International to restrain the International from alleged threats of violence. The denial of injunction was sustained by the Court of Appeals in the case of *Donnelly Company* v. *Dubinsky*, 154 Fed. (2d) 38. Judge Nordbye stated:

> "It must be remembered that no violence has ever been perpetrated on any of the Donnelly employees or officials. No property of the plaintiff's has ever been injured by violence. No strike has ever been called."

Evidence otherwise admissible may and often should be excluded because it tends to introduce collateral issues diverting the attention of the triers of fact from the precise issues involved in the case and protracts the trial beyond reasonable limits. The admission or exclusion of such evidence rests very largely in the discretion of the trial judge, here the examiner, and the Board.

The foregoing proposition is elementary. The following is a characteristic statement of the law:

> "This general rule (admission of all relevant evidence), however, is subject to the important qualification that testimony which does have some tendency to establish a material fact may be rejected by a trial judge; and should be rejected, when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case, and protract the trial beyond reasonable limits.

This limitation of the general rule requiring all relevant testimony to be admitted to which we have last alluded, is not only reasonable in itself, but it is well supported by the authorities. * * *"

"It is always a question within the discretion of the trial judge as to how far parties may be permitted to go into collateral issues; such discretion being exercised by a fair consideration whether the evidence is relevant to the issue, its probable effect upon the jury, the likelihood of confusing the issues, and the probable time that will be consumed if such collateral issues are followed to their legitimate ends." *New England Trust Co. v. Farr*, 53 F. (2d) 103, l. c. 110.

The same principle is announced in 1, Greenleaf on Evidence, Section 14A, 16th Edition, wherein it is called the Doctrine of Collateral Inconvenience; *Schradsky v. Stimson*, 76 F. 730, l. c. 734; *Lack v. C. B. & Q. Railroad Co.*, 281 Mo. 532, 219 S. W. 919, l. c. 922; *Golden Reward Mining Co. v. Burton*, 97 F. 413, l. c. 416; *Westworth v. Smith*, 44 N. H. 419, 82 Am. Dec. 228; *Thompson v. Boucie*, 4 Wall. 463, 471, 18 L. Ed. 423.

We submit the action of the examiner, approved by the Board, with respect to the evidence in question, was not such an abuse of discretion as to constitute reversible error even in a common law trial, much less a denial of due process of law.

POINT FOUR.

The examiner did receive and both the examiner and the Board did consider and weigh the employees' testimony (151 Fed. (2d) l. c. 871).

By employees' testimony, as used by the court and counsel, means the conclusionary evidence of employees as to their impulses and motives in joining the plant union.

which was excluded in the first hearing, but admitted in the second. The Court of Appeals by Judge Sanborn (l. c. 871) holds that in the second hearing there was no error in the receipt or rejection of such testimony and that this is a correct conclusion is demonstrated by the record.

However, both Judges Sanborn and Riddick declared and held that while such evidence had been properly admitted, yet neither the examiner nor the Board had given proper consideration and weight thereto (151 Fed. (2d) l. c. 871 and 877). The record conclusively shows that both the examiner and the Board not only received such evidence, but considered and weighed the same.

The examiner and the Board obeyed the court's direction and *did receive the employees' testimony.*

The trial examiner in his report stated:

> "The undersigned accorded the respondent and the DGWU an opportunity to introduce all of the competent and material evidence which was rejected at the prior hearing * * *." (Volume X 3848.)

The *Board's final report* recites:

> "In remanding the case to the Board for further hearing the Circuit Court directed that the respondent and the DGWU be permitted to adduce the previously proffered testimony of respondent's employees to show, in substance, that they formed and joined the DGWU, of their own free will and that they were not influenced, interfered with, or coerced by the respondent in choosing that organization as their bargaining representative. In compliance with the Court's mandate and pursuant to the respective offers of proof, submitted by the respondent and the DGWU at the original hearing, the Board permitted the introduction of such testimony." (Vol. X 618-619. See also Vol. XIII 25.)

The trial examiner and the Board *considered such testimony.*

The trial examiner considered such evidence. He reported:

> "The undersigned accorded the respondent and the DGWU an opportunity to introduce all of the competent and material evidence which was rejected at the prior hearing. * * * Upon the record thus made (manifestly including the employees' testimony which the examiner in the second preceding sentence stated that he had received), and from his observation of the witnesses, the undersigned makes, in addition to the foregoing the following findings of fact." (Vol. X 3848.)

The Board's finding recites:

> "In compliance with the Court's mandate and pursuant to the respective offers of proof submitted by the respondent and the DGWU at the original hearing the Board permitted the introduction of such testimony (employees' testimony), we have carefully considered all such evidence adduced by the respondent and the DGWU." (Vol. A 618-619.)

The Board *weighed* the employees' testimony.

> "We have carefully considered all such evidence (employees' testimony) adduced by the respondent and the DGWU. We find, however, that the testimony in question (employees' testimony) does not overcome more positive evidence in the record that the respondent committed acts of interference and assistance in the formation and administration of the DGWU, which subjected that organization to the respondent's domination and which thus removed from the employees' selection of the DGWU in complete freedom of choice which the act contemplates." (Vol. 13, 25-26.)

These recitals in the record must be taken as final.

These things deal with mental and subjective processes by the Board and the Board alone knows what those processes were. (*Morgan* v. *U. S.*, 304 U. S. 1, 58 S. Ct. 773.) There is no room for mistake on the part of the Board in these clear and unambiguous statements in the record. Either the Board did, as by it declared, consider and weigh and did not arbitrarily disregard this evidence, or, the Board officially states that which it knows not to be true. The record demonstrates to a moral certainty that the recitals by the examiner and the Board are true.

The whole contention that the Board did not consider and give due weight to the employees' testimony is based upon the word "immaterial" in the Board's finding. (Vol. X 2526.)

An inordinate to-do is made by respondents over the use of the word "immaterial" in the Board's finding, as if its use destroyed all else the Board stated and declared and found. The contention entirely overlooks the indisputable fact that before the use of this word "immaterial" and entirely independent therof the Board had received, considered and weighed all of the evidence and had found that the employees' testimony did not overcome more positive evidence in the record that the Company was guilty of unfair labor practice, a function that Congress has placed exclusively with the Board and by it denied to the court.

Manifestly the Board did not mean, by the use of this word "immaterial," to indicate that such testimony should not be received, considered and weighed in light of the entire record, because *that is precisely what the Board had already done.*

POINT FIVE.

The Court of Appeals, in direct violation of the provisions of the Act, did itself weigh evidence.

The Court of Appeals sets its own opinion of the value and weight of such evidence (employees' evidence) against the opinion of the Board. The Board in its analysis of all the record, and its factual experience, held that such evidence was without weight. The court holds that the Board should have given some weight thereto. There is no escape from the conclusion that the court did undertake to weigh the evidence, fix the evidentiary value thereof, and hold that the Board had not given the weight and value to such testimony that the court thought it entitled to receive. Who is to determine whether given evidence is entitled to great weight, little weight or no weight? If the court is so to determine, then by what standard is the court to decide that the Board did not give proper weight and value to such evidence? Manifestly, the standard would have to be the court's judgment as to whether the given evidence was or was not entitled to weight. But this completes the circle and brings it back to the point of beginning, which is that the court is without power to weigh or to determine the proper weight of evidence, where there is substantial evidence to support the finding of the Board. He who decides whether the Board's action in weighing evidence is arbitrary or not arbitrary is himself weighing evidence and is exercising an authority the Board alone has and the court has not.

Point Six.

A careful reading of the opinions and a consideration of the entire record demonstrates that the Court of Appeals has treated its jurisdiction to review findings and orders of administrative boards as co-extensive with, similar and analogous to its judicial authority in legal proceedings as upon appeal from court to court.

This, in our judgment, is one of the most important questions in this case and constitutes a departure from fundamental and governing principle marking the distinction between judicial authority to review administrative acts on the one hand, and judicial authority upon appeal from court to court, upon the other.

The technical rules governing the interrelationship of judicial tribunals, including scope of authority upon appeal, are partly statutory, but more largely those defined by the courts themselves through long growth of jurisprudence. It is a fundamental error to attempt to apply these rules marking the scope of judicial authority on appeal from court to court to the judicial review of orders of administrative boards. The case of *Federal Communications Commission* v. *Pottsville*, 309 U. S. 134, 60 S. Ct. 437, is illuminating and controlling. As marking the scope of that opinion, the court announced in the beginning that it was called upon to ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts, respectively (309 U. S. 134). The Court said:

> "A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its

power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution, U. S. C. A. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution.'' 60 S. Ct. l. c. 440-441.

The court also said:

"But to assimulate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." 60 S. Ct. l. c. 442.

The opinions of the Court of Appeals could just as well have been written upon appeal in a law case wherein a jury had passed upon the facts. There is no authority that the Court of Appeals could properly exercise in a law appeal that it does not expressly or by necessary

assumption employ in this case. The action of the court in setting aside the order of the Board, on account of procedural errors such as nice questions as to the receipt or rejection of evidence, qualifications of the examiner, weight to be granted to given evidence, and the like, is no whit different from the action of such court on an appeal in setting aside the judgment of the lower court because of similar errors. The court failed to note the "vital differentiations" between the functions of judicial and administrative tribunals and did "stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." (60 S. Ct. l. c. 442.)

No doubt Congress could grant such scope of review of administrative orders to the courts, but on the other hand there is no doubt that it has not done so. The question of the scope of such review has been debated at length between two schools of thought upon what such scope should be. Some advocate that the court should be authorized to review such findings as if the case was on appeal in equity, including determination of the weight of evidence. Others have contended that there should be no statutory review whatever, but that the review should be confined to the constitutional questions, which authority needs no statute. The middle ground is that adopted by Congress, which is in most instances confined to the determination of whether there is substantial evidence to support the findings. Since Congress has acted with respect to the limit of review of orders of the National Labor Relations Board, further discussion, so far as that Act is concerned, must necessarily be confined to the Halls of Congress. The field cannot be expanded by judicial legislation.

Principles of Public Administrative Law Here Involved.

Public administrative law is a comparative newcomer in American Jurisprudence (42 Am. Jur. 287). Professor of Law, now Mr. Justice Frankfurter, describes administrative law by saying that it deals with the field of control exercised by agencies other than courts, and the field of control exercised by courts over such agencies (75 U. of Pa. L. Rev. 615). An extended and learned article upon public administrative law, dealing with its history, the conditions with which it concerns itself, its relation to common law principles and procedure, and the authority and limitation upon authority of the courts, is contained in 42 Am. Jur. 281 and following. The principles herein stated, in our judgment, are firmly established by court decisions and law writers. The leading case, of course, is the Pottsville case, see *Morgan* v. *U. S.*, 304 U. S. 1, 58 S. Ct. 773; address of Elihu Root to the American Bar Association, 41 ABA Rep. 355, and following; Fréund "Cases on Administrative Law," page 3; Ralph F. Fuchs, 47 Yale Law Journal, 538; Professor Frankfurter, 75 U. of Pa. L. Rev. 615.

The subject matter is far too extended to cover in a brief.

It is our submission that the decision of the Court of Appeals is in conflict with the foregoing fundamental principles as announced in these authorities.

POINT SEVEN.

Failure of the Board to designate a trial examiner for the second hearing, other than the one who conducted the first hearing.

It is difficult to determine what, if anything, the Court of Appeals ruled on this question. Judge Sanborn expressly ruled that the proceedings of the Board did not

lack due process because of alleged bias or prejudice against the Company or the plant union. He likewise expressly ruled as follows:

> "We think that it cannot be said that it appears from the record of the proceedings before the examiner and before the Board that there was denial of due process because of bias or prejudice, or collusion."

Judge Woodrough ruled that the examiner was properly qualified:

> "Neither do I find evidence of bias or prejudice to disqualify the examiner in this case. He seems to me to have ruled in accord with the dictates of his conscience and to have endeavored, against great resistance, to keep the trial within the rational relation to the charges to be tried." 151 Fed. (2d) l. c. 880.

Judge Riddick, in his concurring opinion l. c. 877, specifies the grounds upon which he holds that there was a denial of due process, but he does not mention as one of said grounds the failure to appoint a new examiner.

Judge Sanborn (l. c. 870) mildly criticizes the Board, but does not say that its action in this respect constituted a denial of due process.

The examiner was not disqualified because in prior proceeding he had expressed the then opinion that certain evidence was immaterial. *Walker* v. *United States*, 116 Fed. (2d) 458 (9 CCA); *Ryan* v. *United States*, 99 Fed. (2d) 864; *Refior* v. *Lansing Drop Forge Co.*, 124 Fed. (2d) 440; *O'Malley* v. *United States*, 128 Fed. (2d) 676 (8 CCA); *Berger* v. *United States*, 255 U. S. 22, 41 S. Ct. 230.

A continuation in office of the examiner for further proceedings was peculiarly appropriate because of his knowledge of the issues and familiarity with some 5000

pages of testimony. There is nothing in the record to show that the consideration given by the examiner of the employees' evidence was influenced to any degree by his former opinion before the court had spoken. There is nothing to show that after the court's ruling in the first case the examiner prejudged the testimony without weight before he received and reconsidered it. There is nothing to show that the reconsideration of the evidence, both by the examiner and the Board, was not in good faith, a true reconsideration and reweighing.

The authority of the Board to correct errors upon the part of the examiner is far broader than the authority of the court correcting mistakes upon the part of the judge. The trial examiner has no authority to rule finally on anything. The Board may send the case back to the examiner to take further evidence, to make other and different rulings. So far as the merits of the case are concerned, the report of the examiner at best is but advisory and may be accepted or rejected or modified by the Board itself. If it be good law that a judge is not to be disqualified because of his previous opinions and rulings, even in the same case, then it is also good law that an examiner is not to be disqualified for such reason.

The contention that under this record that there was a denial of due process because the Board failed to appoint another examiner after the remand, is, in our judgment, trivial.

Respectfully submitted,

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